S. HRG. 100-346

# COMMERCIAL FISHING INDUSTRY VESSEL SAFETY AND COMPENSATION ACT OF 1987

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## HEARING

BEFORE THE

NATIONAL OCEAN POLICY STUDY

OF THE

## COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION
## UNITED STATES SENATE

ONE HUNDREDTH CONGRESS

FIRST SESSION

ON

## S. 849

TO ESTABLISH GUIDELINES FOR TIMELY COMPENSATION FOR TEMPORARY INJURY INCURRED BY SEAMEN ON FISHING INDUSTRY VESSELS AND TO REQUIRE ADDITIONAL SAFETY REGULATIONS FOR FISHING INDUSTRY VESSELS

SEPTEMBER 16, 1987

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# COMMERCIAL FISHING INDUSTRY VESSEL SAFETY AND COMPENSATION ACT OF 1987

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WEDNESDAY, SEPTEMBER 16, 1987

U.S. SENATE,
COMMITTEE ON COMMERCE, SCIENCE AND TRANSPORTATION,
NATIONAL OCEAN POLICY STUDY,
*Washington, DC.*

The committee met at 10:05 a.m. in room SR-253, Russell Senate Office Building, Hon. John Kerry presiding.

Staff members assigned to this hearing: Barry Kalinsky and Mike Nussman, professional staff members; and Bob Eisenbud, minority professional staff member.

## OPENING STATEMENT BY SENATOR KERRY

Senator KERRY. The hearing will come to order.

My apologies for being a moment late. I would like to welcome our distinguished witnesses who are here today to offer expert testimony on S. 849, the Commercial Fishing Industry Vessel Safety and Compensation Act of 1987.

As everyone here knows, Senators who are members of this committee and those of you who are here to testify and listen, the issue of safety aboard fishing vessels is one of increasing concern, and the availability of protection and indemnity insurance for fishermen who receive temporary injuries is greatly augmented in the level of concern that we all have about fishermen's ability to obtain that coverage.

And today more and more boats and more seamen are going out fishing than ever before, and going out with less insurance. In many cases captains cannot get insurance. People are paying $70,000 or more on occasion to insure a boat and only getting half insurance or less in many cases.

At the same time, the number of boats lost has increased. I think we have gone from something like 200 boats a year to 300 boats a year.

So we have reached a point where if we are going to have a fishing industry, which we want to have, we need to, I think, respond somehow to this question of increasing costs, but in a way that is obviously responsible. And I think that is the effort of this committee today, to build on the experience of last year's efforts and go-around in the House and see whether we can fashion some legislation that makes sense; legislation that recognizes the needs of insurance companies while at the same time building on our ability to be safer and to reduce the number of claims.

I want witnesses and observers alike to know that already there has been a go-around on the Studds bill, which is the companion legislation in the House. Some changes have been made, and hopefully today we will not begin where my bill, the companion bill, begins, but rather pick up where the progress has been made in the House and talk about the current draft as I think it exists in the House.

I think it would be more productive to us.

Finally, I would like to make it clear that this committee is approaching this with an open mind. We have a draft, we have some ideas on the table. I have no question but that they can be improved on and there is room for improvement, and I hope today we can address some of those possibilities.

We have a number of panelists. I think we are going to have about five panelists. So I am going to try to keep this moving along at a fairly crisp pace and allow, obviously, for enough time to question, to probe and see where we can go.

Let me turn to my colleague from Rhode Island, Senator Chafee, if you have any opening comments you wish to make.

Senator CHAFEE. Did I understand Senator Adams had a time problem? If he wanted to go first——

Senator ADAMS. I have to leave at 10:30, but that is fine.

Senator TRIBLE. We hope that is not a problem, do we not.

## OPENING STATEMENT BY SENATOR CHAFEE

Senator CHAFEE. Well, thank you, Mr. Chairman.

I am glad to have an opportunity to comment on this bill which you and I, together with our distinguished colleague from the State of Washington, Senator Adams, introduced last March in the Senate.

The dual problems in the commercial fishing industry that you pointed out, namely the escalating insurance rates on the one hand and safety aboard the vessels on the other hand, are of great concern to the thousands of Americans who earn their living in the fishing industry.

As you all know, I come from a state that is deeply involved in the fishing industry. So these are matters of great concern to my constituents and to me. This bill that we have goes a long way towards addressing these problems.

Now, commercial fishing clearly is one of the most dangerous, if not the most dangerous, occupations in the United States. According to Coast Guard figures, 250 vessels a year on an average are lost, are sunk. Now, that is an incredible figure.

The death rate for fishermen is seven times the national average for all insurance groups and twice that of mining, the next most hazardous occupation. Thus, it is no surprise that our commercial fishing industry has been caught up in the general liability, insurance liability crisis.

The cost of protection and indemnity insurance for the fishing industry has soared in recent years, and often it is not available at any price. As insurance becomes more unaffordable, fishing vessel owners are either going without insurance or in some instances are going out of business.

Now, the causes of this are complex and cannot be solely attributed to very large jury awards. Lax safety standards, inadequate care of injured or disabled seamen, poor vessel design, and fishery management regulations have all aggravated the problem.

S. 849 is a first step toward a comprehensive solution. It seeks to contain or even to roll back soaring insurance rates by replacing the current inefficient system of litigation for temporary injuries with a system similar to that of workman's compensation and by at the same time—and this is an integral part of this legislation—requiring greater safety on the vessels.

A seaman who suffers a temporary illness, disability, or injury could not sue his employer for damages under the Jones Act or under general maritime law if the employer provided cure and maintenance during the period of illness at a daily rate equal to the greater of 80 percent of the individual's wage or share or $30.

There is going to be a lot of talk here, I suspect, that you are only paying him $30. That is nonsense. We are not just paying him $30. We are paying at the greater of $30 a day or 80 percent of the individual's share.

A temporary illness, disability injury would be defined as one which, after cure, the seaman can return to his previous or equivalent employment and does not require further medical care, has not lost a limb, appendage, sight, hearing, or incurred permanent disfigurement.

In the case of gross negligence or willful misconduct, there is no limit on liability.

These changes would introduce greater predictability into awards settlements and bring down insurance rates. At the same time, they protect the interests of injured seamen by assuring them their compensation and treatment.

The bill provides for enhanced safety. The Secretary of Transportation is to develop regulations for the installation, maintenance, and proper use of emergency position-indicating beacons, lifeboats, exposure suits, and signaling devices.

This safety equipment clearly will save lives and could lead to lower premiums. And Mr. Chairman, it is worth noting that the National Transportation Safety Board, in a recently released draft report, stated that the safety elements in this bill will reduce fishing vessel casualties and loss of life.

Some of the witnesses we are going to hear from, notably one of our constituents Jim Costakes from Massachusetts, a fisherman, and Mrs. Peggy Barry, who lost her son in a tragic and preventable fishing accident—the inclusion of the enhanced safety requirements provides a compelling reason to expedite its passage.

And I want to tip my hat to Mrs. Barry and Ambassador Barry for all the work they have done to press this issue and keep it high in the Congressional agenda. Also, Mr. Chairman, let me point out that a bill, as you mentioned, similar to this was hotly debated in the House last year and defeated by a wide margin.

But that was because of the cap of a half million dollars. The trial lawyers very vigorously opposed that and worked successfully to ensure defeat of the bill last year. Since then, that cap has been removed from the legislation we have got this year and the head of the trial lawyers, Mr. Robert Habush, has been quoted as saying he is prepared to support new fishing legislation with changes such as the removal of the cap.

We do that here. I just hope that we are going to hear from the trial lawyers, Mr. Schecter and Mr. White, and I hope that they will support this legislation and not just oppose it because it might affect their group in some way.

What we have got to think about is the fishermen themselves, and I believe that this does that, Mr. Chairman. So I am glad we are doing this, and I look forward to having additional hearings, certainly in my own state. But I would like to hear from the folks there who cannot come down for this hearing.

Thank you.

Senator KERRY. Thank you very much, Senator. And I thank you for your help and input on this bill. I think we both share some important concerns, and not just with our states but with other states in this country where fishing is a major industry and where we hope it will remain so.

So I thank you for your participation.

Senator Adams.

## OPENING STATEMENT BY SENATOR ADAMS

Senator ADAMS. Thank you, Mr. Chairman.

I apologize that I will be gone during part of the hearing this morning because I have to preside, but I thank the chairman for the opportunity to make an opening statement with regard to this matter.

And my friend and colleague from Rhode Island has very well stated many of the points that I wish to make.

I have just two comments I would like to make, Mr. Chairman, in addition to supporting what Senator Chafee has said.

We are, first, all aware of the fact that there can be a great deal of contention in issues involving fishing and involving the maritime area. Each have and has their own interest, and they often struggle over that. But I hope that this bill, as the chairman stated, will be the starting point for the type of protection for people going to sea that we can expect that the Senate of the United States and the Congress and later the Administration will support.

Having worked on fishing boats during the period of time that I was both in college and going through law school, I cannot emphasize strongly enough that the dangers of those who go to sea in small boats is incredible, as Senator Chafee has stated.

It is not just statistically that we lose 250 boats a year, but our casualties are very high, because in our particular part of the country you are out on the North Pacific. The period of time that you last in the water because of the chill factor and the manner in which we fish at the present time means that your chances of survival are very small.

And we also have the problem that this bill addresses—and this is my second point I would like to make. This is a strong effort that I hope will be developed today and that we can later pass in the Senate and the House to combine and attempt to reduce insurance rates, and thus assist those who cannot insure themselves; and more important, to protect those who are fishing by giving an immediate type of compensation similar to workman's compensation for those who have temporary injuries.

Fishing is a cyclical industry. Those who are involved in it are often unable to immediately obtain other employment. And certainly, long litigation for immediate suffering is something that is impossible.

I think, Mr. Chairman, that this bill is a good approach. I hope that it will be enacted. I know that it now has widespread support, and I appreciate very much, Mr. Chairman, your scheduling these hearings for today.

Senator **Kerry**. Thank you very much, Senator.

Also, I would like to submit for the record the statement of the chairman, Senator Hollings, and it will be printed in full in the record also.

Senator Trible. I am following our chairman. Usually it is on the order of first arrival.

Senator **Trible**. Well the chairman always knows best. Let the record reflect that I was willing to yield to my senior colleague from Alaska.

Senator **Kerry**. Let the record also reflect for posterity that the chairman knows best.

## OPENING STATEMENT BY SENATOR TRIBLE

Senator **Trible**. Mr. Chairman, I will speak very briefly.

Let me first of all point out the committee has been engaged in a review of the insurance and safety problems facing the commercial fishing industry since 1985. In fact, in the last Congress I chaired hearings here focusing on vessel safety insurance problems.

So there has been a sensitivity to these problems, and hopefully we can build a consensus about a proper course of action.

I want to reaffirm my commitment to that process. Fishermen deserve safe conditions while working in the dangerous ocean environment. At the same time, vessel owners deserve consistency and predictability in their liability to injured workers.

Indeed, these two issues must be met in order to have a fishing industry that can survive and flourish and provide the kinds of jobs and economic advantage that is necessary.

The East Coast Fisheries Association represents Virginia fishermen. Mr. Chairman, I would ask unanimous consent at this point to offer for the record a statement of Bradley D. Brauer, President, with reference to this legislation, expressing the Association's support for this approach.

Senator **Kerry**. Without objection, that will be entered in the record in the appropriate place.

Senator **Trible**. I will yield the floor.

Senator **Kerry**. Thank you, Senator. I appreciate it.

Senator Stevens.

## OPENING STATEMENT BY SENATOR STEVENS

Senator **Stevens**. Mr. Chairman, I do recognize the value of the chairman and his importance, and I agree with the policy of the committee that those who come first should speak first.

Let me say, Mr. Chairman, that I have a very personal interest in this. My youngest son is a fisherman. Right now, as a matter of fact, he is on his way to Dutch Harbor on a vessel.

I remember that he told me once not too long ago that he was twice on one vessel that left in a group of three leaving Dutch Harbor and his vessel was the only one to return on both occasions. He has shown me some very vivid pictures of vessels that were sinking, where they had no ability to help them at all.

We are very worried about the whole prospect of this legislation in one regard, because our industry is now the largest fishing industry in the country. We have half the coastline of the United States.

We have no Coast Guard west of Kodiak on the surface, and the concept of mandatory licensing and inspection have to be taken into consideration. On the other hand, I do believe that we must have the safety standards there and we have to try to do our best to provide the protections that we need for those who are involved in this very dangerous industry.

It is one of great concern to us because of the increasing statistics in the fishing industry, and those affect the gentleman from Washington's constituents as well as mine because a vast number of his people are in the waters off Alaska.

I do hope that we can keep in mind the regional differences of the fishing industry and the needs, and it is going to be my task, I think, to try to see if we can bring this legislation into the scope of the genius of the Magnuson Act, to see if we can mandate some national standards and authorize regions to increase those standards, and authorize regions to increase the inspection requirements where inspection is available.

Today to require an inspection of vessels engaged in the fishing operation in Dutch Harbor would mean they would sit there and wait for someone to come from Seattle or from Juneau to do it. And I think that we have to really be cognizant of the difference.

My state now harvests the largest amount of fish. The highest value in terms of the fishing harvest is coming now from Alaska, and as we now complete the last transition on the 200 mile limit bill, we see a fishing industry that is going to triple in size and it is already the largest in the country.

My staff says this bill does not require inspection. I do believe we have to look at the whole spectrum of problems that we face in this industry, keeping in mind the regional differences.

So I look forward to working with you.

Senator KERRY. Well, I thank the Senator. I know that he has had very long involvement on this issue and that he does indeed represent a very viable and active sector of the industry in his state. I look forward to working with him on it.

I think everyone can see that there is a broad consensus about the need to try to address this issue and a great willingness among all the participants of this committee in a strictly bipartisan and open way to try to work to solve a very real problem.

[The statement referred to and the bill follow:]

## Opening Statement by the Chairman

This year begins the second decade of federal fisheries management within the framework of the Magnuson Fishery Conservation and Management Act. In that decade, we have seen a significant increase in harvests by U.S. fishermen. The value of their catch has jumped by over a billion dollars a year. American demand for seafood continues to meet and even outstrip the industry's ability to provide high quality products. Yet, despite these positive indicators, serious problems still face the U.S. commercial fishing industry. Today's hearing focuses on one of the most pressing issues—resolving fishing vessel safety and insurance questions.

Catching fish has been a respected and important occupation since our nation's inception. It also is a difficult and dangerous way to earn a living. I understand that nearly 300 fishing vessels are lost each year. This loss rate is five times that of U.S. ocean-going cargo ships and three times that of U.S. tankers. The risk for a fisherman of losing his life is seven times greater than for the average worker in U.S. industries. Many of the losses are unavoidable casualties of unpredictable and often treacherous working conditions at sea. However, I am concerned that some losses would be preventable if safety become a stronger consideration in both fishery management and in day-to-day vessel operations. I look forward to today's testimony to provide recommendations concerning improving fishing vessel safety.

With respect to insurance, high cost and difficulty of obtaining all types of fishing vessel insurance have been persistent problems in recent years. From Hawaii to Maine, we have all received reports from fishermen that little coverage is available and that premiums continue to escalate. It has become increasingly clear that a balance must be struck between providing adequate compensation for injured crew members and maintaining the viability of the U.S. fishing industry. Today's discussion should provide valuable insights for developing a workable solution to this challenge.

100TH CONGRESS
1ST SESSION

# S. 849

To establish guidelines for timely compensation for temporary injury incurred by seamen on fishing industry vessels and to require additional safety regulations for fishing industry vessels.

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IN THE SENATE OF THE UNITED STATES

MARCH 26 (legislative day, MARCH 24), 1987

Mr. CHAFEE (for himself and Mr. KERRY) introduced the following bill; which was read twice and referred to the Committee on Commerce, Science, and Transportation

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# A BILL

To establish guidelines for timely compensation for temporary injury incurred by seamen on fishing industry vessels and to require additional safety regulations for fishing industry vessels.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

## SECTION 1. SHORT TITLE.

This Act may be cited as the "Commercial Fishing Industry Vessel Safety and Compensation Act of 1987".

# TITLE I—COMPENSATION FOR TEMPORARY INJURY ON FISHING INDUSTRY VESSELS

## SEC. 101. COMPENSATION FOR TEMPORARY PERSONAL INJURY.

The Act of March 4, 1915 (chapter 153; 38 Stat. 1164) is amended by adding at the end the following:

"SEC. 21. (a) In this section—

"(1) 'fishing vessel', 'fish processing vessel', and 'fish tender vessel' have the same meanings given those terms in section 2101 of title 46, United States Code.

"(2) an illness, disability, or injury shall be considered temporary if, after cure, the seaman—

"(A) can return to the seaman's previous (or equivalent) employment;

"(B) does not require further medical care with respect to the illness, disability, or injury;

"(C) does not have a substantial loss of sight, voice, or hearing; and

"(D) has not lost an appendage or suffered permanent disfigurement.

"(b) A civil action (including an action for contribution or indemnification) may not be brought under any law of the United States against the employer of a seaman, a vessel owner, or a vessel for loss suffered as the result of a temporary illness, disability, or injury suffered by a seaman during the course of the seaman's employment to a fishing, fish processing, or fish tender vessel if the employer or vessel owner makes payment for, or otherwise provides—

"(1) cure for the ill, disabled, or injured seaman; and

"(2) maintenance during the period of illness, disability or injury in an amount equal to—

"(A) for each day that vessel is on a voyage, the greater of—

"(i) 80 percent of the wage or share the seaman would have received for that day if the seaman had been employed on the vessel for that voyage; or

"(ii) $30; and

"(B) for each day that vessel is not on a voyage, $30.

"(c) The Secretary of Transportation shall annually review the dollar figure in subparagraphs (A)(ii) and (B) of subsection (b)(2). The Secretary may periodically increase or decrease that figure, but not by more than the percentage increase or decrease in the Consumer Price Index for the period considered.

"(d) Subsection (b) shall not apply if—

"(1) the temporary illness, disability, or injury was caused by the gross negligence or willful misconduct of the owner or employer, as the case may be;

"(2) the temporary illness, disability, or injury was primarily caused by a violation of chapter 45 of title 46, United States Code, that was within the knowledge of the owner or employer, as the case may be; or

"(3) payment or provision of maintenance and cure is not made in the manner described in subsection (b).".

## SEC. 102. STATUTE OF LIMITATIONS.

The first section of the Act entitled "An Act to provide a uniform three-year statute of limitations in actions to recover damages for personal injury or death, arising out of a maritime tort, and for other purposes" (46 App. U.S.C. 763a) is amended by striking "That," and inserting "That (a)" and by adding at the end the following:

"(b) A civil action against the employer of a seaman or the owner of a fishing, fishing processing, or fish tender vessel for recovery of damages for illness, injury, disability, or death suffered during the course of the seaman's employment to a fishing, fish processing, or fish tender vessel may not be maintained unless started within 2 years from the date the cause of action accrued.".

## TITLE II—COMMERCIAL FISHING INDUSTRY VESSEL SAFETY

### SEC. 201. FISHING INDUSTRY VESSEL SAFETY REQUIREMENTS.

(a) Chapter 45 of title 46, United States Code, is amended to read as follows:

### "CHAPTER 45—COMMERCIAL FISHING INDUSTRY VESSELS

"Sec.
"4501. Application.
"4502. Safety standards.
"4503. Equivalency.
"4504. Prohibited acts.
"4505. Termination of unsafe operations.
"4506. Exemptions.
"4507. Penalties.
"4508. Commercial Fishing Industry Vessel Advisory Committee.

**"§ 4501. Application**

"(a) This chapter applies to a fishing, fish processing, and fish tender vessel.

"(b) This chapter does not apply to the carriage of bulk dangerous cargoes regulated under chapter 37 of this title.

**"§ 4502. Safety standards**

"(a) A fishing, fish processing, and fish tender vessel must—

"(1) if propelled by machinery, be provided with fire extinguishers, capable of promptly and effectively extinguishing a combustible or flammable liquid fuel, that shall be kept in a condition for immediate and effective use and so placed as to be readily accessible;

"(2) carry at least one readily accessible life preserver or other lifesaving device for each individual on board;

"(3) have the carburetors of each engine on board the vessel (except an outboard engine) using gasoline as a fuel, equipped with an efficient flame arrestor, backfire trap, or other similar device;

"(4) if using a volatile liquid as fuel, be provided with the means for properly and efficiently ventilating enclosed spaces, including engine and fuel tank compartments, so as to remove any explosive or flammable gases; and

"(5) be provided with visual distress signals.

"(b) In addition to the requirements of subsection (a) of this section, the Secretary shall prescribe regulations for a documented fishing, fish processing, or fish tender vessel operating beyond the Boundary Line, for the installation, maintenance, and use of—

"(1) at least one readily accessible emergency position indicating beacon, or similar electronic position indicating device;

"(2) lifeboats or liferafts sufficient to accommodate all individuals on board;

"(3) at least one readily accessible exposure suit for each individual on board a vessel operating on the waters described in section 3102 of this title;

"(4) radio communications equipment sufficient to effectively communicate with land-based search and rescue facilities; and

"(5) other equipment required to minimize the risk of injury to crew during vessel operations, if the Secretary determines that a risk of serious injury exists that can be eliminated or mitigated by that equipment.

"(c) For an uninspected fish processing vessel entered into service after December 31, 1987, and having more than sixteen individuals on board primarily employed in the preparation of fish or fish products, the Secretary shall prescribe additional regulations for—

"(1) navigation equipment, including radars, fathometers, compasses, radar reflectors, lights, sound-producing devices, nautical charts, and anchors;

"(2) life saving equipment, including life preservers, exposure suits, lifeboats or liferafts, emergency position indicating radio beacons, signaling devices, bilge pumps, bilge alarms, life rails and grab rails, and medicine chests;

"(3) fire protection and firefighting equipment, including fire alarms, portable and semiportable fire extinguishing equipment, and flame arrestors;

"(4) the use and installation of insulation material;

"(5) storage methods for flammable or combustible material; and

"(6) fuel, ventilation, and electrical systems.

"(d)(1) In addition to the other requirements of this section, the Secretary shall prescribe regulations for the operating stability of a documented fishing, fish processing, or fish tender vessel—

"(A) the keel for which was laid after December 31, 1988; or

"(B) whose physical characteristics are substantially altered after December 31, 1988, in a manner affecting the vessel's operating stability.

"(2) The Secretary may accept, as evidence of compliance by a vessel with this subsection, a certification of compliance issued by the person providing insurance for the vessel.

"(e) In prescribing regulations under this section, the Secretary—

"(1) shall consider the specialized nature and economics of the type of vessel operations and the character, design, and construction of the type of vessel;

"(2) shall consult with representatives of the private sector having experience in the operation of vessels to which this chapter applies to ensure the practicability of these regulations; and

"(3) may not require the alteration of a vessel or associated equipment or of the construction of a vessel or manufacture of a particular item of equipment that was begun before the effective date of the regulation.

### "§ 4503. Equivalency

"An uninspected fish processing vessel entered into service after December 31, 1987, and having more than sixteen individuals on board primarily employed in the preparation of fish or fish products—

"(1) is deemed to comply with the requirements of this chapter if it has an unexpired certificate of inspection issued by a foreign country that is a party to an International Convention for Safety of Life at Sea to which the United States Government is a party, and

"(2) may not be required by the Secretary to alter or replace the equipment or structural requirements required under this chapter.

### "§ 4504. Prohibited acts

"A person may not operate a vessel in violation of this chapter or a regulation prescribed under this chapter.

### "§ 4505. Termination of unsafe operations

"If an official charged with the enforcement of this chapter observes a fishing, fish processing, or fish tender vessel being operated in an unsafe condition and, in the judgment of that official, the operation creates an especially hazardous condition, the official may direct the operator of the vessel to take immediate and reasonable steps necessary for the safety of individuals on board the vessel, including directing the operator to return to a mooring and to remain there until the situation creating the hazard is corrected or ended.

### "§ 4506. Exemptions

"(a) The Secretary may exempt a vessel from any part of this chapter when, under regulations (including regulations on special operating conditions) prescribed by the Secretary, the Secretary finds that—

(1) good cause exists for granting an exemption; and

"(2) the safety of the vessel and those on board will not be adversely affected.

"(b) A fishing, fish processing, or fish tender vessel is exempt from the provisions of section 4502(b)(2) if it—

"(1) is less than 36 feet in length; and

"(2) is not operating on the high seas.

### "§ 4507. Penalties

"(a) If a vessel to which this chapter applies is operated in violation of this chapter or a regulation prescribed under this chapter, the owner, charterer, managing operator, agent, master, and individual in charge are each liable to the United States Government for a civil penalty of not more than $5,000. The vessel also is liable in rem for the penalty.

"(b) A person willfully violating this chapter or a regulation prescribed under this chapter shall be fined not more than $5,000, imprisoned for not more than one year, or both.

### "§ 4508. Commercial Fishing Industry Vessel Advisory Committee

"(a) The Secretary shall establish a Commercial Fishing Industry Vessel Advisory Committee. The Committee—

"(1) may advise, consult with, report to, and make recommendations to the Secretary on matters relating to the safe operation of fishing, fish processing, and fish tender vessels, including navigation safety, safety equipment and procedures, marine insurance, vessel design, construction, maintenance and operation, and personnel qualifications and training;

"(2) may review proposed regulations under this chapter;

"(3) may make available to Congress any information, advice, and recommendations that the Committee is authorized to give to the Secretary;

"(4) shall meet at the call of the Secretary, but not less than once during each calendar year.

"(b)(1) The Committee shall consist of seventeen members with particular expertise, knowledge, and experience regarding the commercial fishing industry as follows:

"(A) ten members from the commercial fishing industry who—

"(i) reflect a regional and representational balance; and

"(ii) have experience in the operation of vessels to which this chapter applies or as a crew member or processing line worker on a fish processing vessel;

"(B) three members from the general public, including, whenever possible, an independent expert or consultant in maritime safety and a member of a national organization composed of fishing, fish processing, or fish tender vessel and marine insurance interests;

"(C) one member from each of the following—

"(i) naval architects or marine surveyors;

"(ii) manufacturers of fishing, fish processing, or fish tender vessel equipment;

"(iii) education or training professionals related to fishing, fish processing, or fish tender vessel safety or personnel qualifications; and

"(iv) underwriters engaged in insuring fishing, fish processing, or fish tender vessels.

"(2) At least once a year, the Secretary shall publish a notice in the Federal Register and in newspapers of general circulation in coastal areas soliciting nominations for membership on the Committee, and, after timely notice is published, appoint the members of the Committee. A member may be appointed to any number of terms.

"(3)(A) The term of a member is three years.

"(B) If a vacancy occurs in the membership of the Committee, the Secretary shall appoint a member to fill the remainder of the vacated term.

"(4) The Committee shall elect one of its members as the Chairman and one of its members as the Vice Chairman. The Vice Chairman shall act as Chairman in the absence or incapacity of, or in the event of a vacancy in the office of, the Chairman.

"(5) The Secretary shall, and any other interested agency may, designate a representative to participate as an observer with the Committee. These representatives shall, as appropriate, report to and advise the Committee on matters relating to fishing, fish processing, or fish tender vessels under the jurisdiction of their respective agencies. The Secretary's designated representative shall act as executive secretary for the Committee and perform the duties set forth in section 10(c) of the Federal Advisory Committee Act (5 App. U.S.C.).

"(c)(1) The Secretary shall, whenever practicable, consult with the Committee before taking any significant action relating to the safe operation of fishing, fish processing, or fish tender vessels.

"(2) The Secretary shall consider the information, advice, and recommendations of the Committee in consulting with other agencies and the public or in formulating policy regarding the safe operation of fishing, fish processing, or fish tender vessels.

"(d)(1) Except an officer or employee of the United States or a member of the Armed Forces, a member of the Committee, when attending meetings of the Committee or when otherwise engaged in the business of the Committee, is entitled to receive—

"(A) compensation at a rate fixed by the Secretary, not exceeding the daily equivalent of the current rate of basic pay in effect for GS-18 of the General Schedule under section 5332 of title 5 including travel time; and

"(B) travel or transportation expenses under section 5703 of title 5.

"(2) Payments under this section do not render a member of the Committee an officer or employee of the United States or a member of the Armed Forces for any purpose.

"(3) A member of the Committee who is an officer or employee of the United States or a member of the Armed Forces may not receive additional pay on account of the member's service on the Committee.

"(4) The provisions of this section relating to an officer or employee of the United States or a member of the Armed Forces do not apply to a member of a reserve component of the Armed Forces unless that member is in an active status.

"(e)(1) The Federal Advisory Committee Act (5 U.S.C. App.) applies to the Committee, except that the Committee terminates on September 30, 1992.

"(2) Two years prior to the termination date in this section, the Committee shall submit to Congress its recommendation whether the Committee should be renewed and continued beyond the termination date.".

(b) Of the members first appointed to the Commercial Fishing Industry Advisory Committee under section 4508 of title 46, United States Code—

(1) one-third of the members shall serve a term of one year and one-third of the members shall serve a term of two years, to be determined by lot at the first meeting of the Committee; and

(2) terms may be adjusted to coincide with the Government's fiscal year.

(c) Subsection (e) of section 4102 of title 46, United States Code, is repealed.

### SEC. 202. ACCIDENT DATA STATISTICS.

Chapter 61 of title 46, United States Code, is amended by adding at the end the following new section:

**"§ 6104. Commercial fishing industry vessel casualty statistics**

"(a) The Secretary shall compile statistics concerning marine casualties from data compiled from insurers of fishing, fish processing, fish tender vessels.

"(b) A person underwriting primary insurance for fishing, fish processing or fish tender vessels shall submit periodically to the Secretary data concerning marine casualties that is required by regulations prescribed by the Secretary.

"(c) After consulting with the insurance industry, the Secretary shall prescribe regulations under this section to gather a statistical base for analyzing vessel risks.".

(b) The analysis for chapter 61 of title 46, United States Code, is amended by adding at the end the following:

"6104. Commercial fishing industry vessel casualty statistics.".

(c) Section 6103 of title 46, United States Code, is amended as follows:

(1) before "An" insert "(a)"; and

(2) add the following new subsection:

"(b) A person violating section 6104 of this title or a regulation prescribed under that section is liable to the Government for a civil penalty of not more than $5,000.".

Senator KERRY. And I would like to get down to that now by proceeding to the testimony. If the members of the first panel would please come forward, Captain Piche and Mr. James Douglas. Thank you.

Good morning, gentlemen. Thank you for coming. We look forward to your testimony. If you would state your names and who you represent for the record and proceed, we would appreciate it.

Because of the size, I do not want to put you in a state of discomfort. We always try to do this. It does not always work. But because of the numbers of panels, if you feel comfortable summarizing your testimony, I assure you the full text will be printed in the record. And obviously, the more questions that we have time for I think the better the hearing will be.

Would you like to proceed, Captain Piche?

## STATEMENTS OF CAPT. GORDON PICHE, CHIEF OF THE MARINE TECHNICAL AND HAZARDOUS MATERIALS DIVISION, U.S. COAST GUARD; AND JAMES E. DOUGLAS, JR., ACTING DEPUTY ASSISTANT ADMINISTRATOR FOR FISHERIES, NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, DEPARTMENT OF COMMERCE

Captain PICHE. Thank you, Mr. Chairman. Good morning, members of the committee.

I am Captain Gordon Piche, Chief of the Marine Technical and Hazardous Materials Division, Office of Marine Safety, Security, and Environmental Protection, U.S. Coast Guard, Headquarters. I served as manager of the Coast Guard's fishing vessel safety task force, and I am pleased to appear before you to address this subject of mutual interest.

Today I would like to offer my comments with respect to safety on S. 849, which impacts the fishing industry. Mr. Chairman, with your permission, I will give you a summary of my testimony and ask that the completed text be entered as part of the record.

Senator KERRY. So ordered.

Captain PICHE. I will preface my comments on the bill with a brief update on fishing vessel safety. The Coast Guard has put a great deal of emphasis on fishing vessel safety during the past three years.

The vessel safety manual and the voluntary standards for fishing vessel construction, which constitute a framework for the improvement of fishing vessel safety, became available in 1985. Up until that time and during 1985, the fishing industry, as you all have noted, had been averaging 84 lives lost and 250 vessels lost per year.

The casualty data for 1986 shows a drop in numbers of lives lost to 52 and vessels lost to 135. It is too early to attribute this reduction solely to the attention placed on safety. However, we consider this a very positive sign of progress.

In addition to the work of the Coast Guard, numerous other groups have been involved in this safety work. These include the NOAA Sea Grant, many state schools, private institutions, fishing industry associations, coops, state governments, and the Classification Society.

We are aware of initiatives to improve safety and training that are ongoing in the states of Alaska, Washington, Oregon, California, Texas, Louisiana, Florida, North and South Carolina, Virginia, Maryland, New Jersey, New York, Rhode Island, Massachusetts, and Maine.

Training activities have had an immediate impact. Four vessels in the Pacific Northwest had serious fires in recent months. Crews on those vessels were able to suppress the fires themselves or contain them until additional help could arrive.

Now, in all four cases the crews had received fire-fighting training in the North Pacific Fishing Vessel Owners Association program and attributed their success to that training.

There has also been great interest in our program, the voluntary, in the international community. We have now presented the framework, that is the safety manual and the standards, at IMO formally to 130 member nations, and it will be placed on the work agenda of the subcommittee on fishing vessel safety and loadlines in the spring.

There is much interest in many of the countries that fully regulate their fishing fleet to the approach we have taken because they have had the same, similar types of casualties to the degree we have had, and the small vessel approach, which most of our fleet is considered small vessels, interest them greatly. In fact, Norway is now taking steps to move forward in the voluntary area.

With regard to S. 849, briefly, we support the safety equipment. In fact, as a result of a bill passed last year, we have gone out earlier this month with a notice of proposed rulemaking we are making for Emergency Position Indication Radio Beacons (EPIRBS). We support the stability criteria requirement. However, I would add that the wording in there should provide for third party delegation by the Coast Guard, that the Coast Guard would set the standards and allow third parties, large, recognized ones such as a Classification Society or other large, recognized groups that we use for third parties, to do that.

We also support the recordkeeping by insurance companies. We are not in total support of the termination clause for unsafe operation. No other commercial vessel can have its operations terminated. It is strictly a judgment call, and with fishing vessels operating many miles from a safe area, that could take valuable Coast Guard resources away from Search and Rescue (SAR) and drug interdiction and other things to escort vessels that we determined would have to come in.

Also, with respect to the advisory committee, we do not feel we have had any problems in recent years interacting with the industry and communicating with them, and we feel that the advisory committee, as large as it is, would not be able to represent the industry any better, and it would be a cost umbrella group that we really do not think we need.

We remain convinced that the voluntary approach is a viable program. Even though the voluntary program is in its infancy, the number of activities being undertaken by the industry and the casualty statistics for the first year under the program are very encouraging. All this is happening without a major investment of government resources. The majority of the cost of improving fishing vessel safety is being voluntarily borne by the industry itself and not the taxpayer.

That concludes my prepared testimony, Mr. Chairman. I will be pleased to answer any questions you may have.

[The statement follows:]

## STATEMENT OF CAPT. GORDON G. PICHE, CHIEF, MARINE TECHNICAL AND HAZARDOUS MATERIALS DIVISION, OFFICE OF MARINE SAFETY, SECURITY AND ENVIRONMENTAL PROTECTION, USCG

Good morning, Mr. Chairman and members of the subcommittee. I am Captain Gordon Piche, Chief, Marine Technical and Hazardous Materials Division, Office of Marine Safety, Security and Environmental Protection, U.S. Coast Guard Headquarters. I served as the Manager of the Coast Guard's fishing vessel safety task force, and I am most pleased to appear before you to address this subject of mutual interest.

Today I would like to offer comments on S. 849 (Mr. Chafee) which impacts the fishing industry. Mr. Chairman, with your permission I will give you a brief summary of my testimony and ask that my prepared statement be entered as part of the record. I will preface my comments on this bill with an update of the Coast Guard's fishing vessel safety program.

The Coast Guard has put a great deal of emphasis on fishing vessel safety during the past three years. The vessel safety manual and the voluntary standards for fishing vessel construction became available starting in 1985. The fishing industry had been averaging 84 lives and 250 vessels lost per year. The casualty data for 1986 shows a drop in numbers of lives and vessels lost. I have attached figures which illustrate the statistics. It is too early to attribute this reduction solely to the attention placed on safety, however we consider this a very positive sign of progress.

Equally significant is the fact that the area of major losses, the Pacific Northwest, is also the area where the industry has taken the strongest steps to improve itself.

A. The North Pacific Fishing Vessel Owner's Association (NPFVOA) has developed training programs and a vessel safety manual. The manual, which was produced in a joint effort with the Coast Guard, is currently in its third printing and over 3,300 copies have been sold. Fifty classes have been held, attended by over 400 fishermen, and video tapes are bing prepared to bring the programs to those who cannot come to the training site.

B. The University of Alaska sea grant has also established a program to bring safety training to the fishermen who cannot come to a central training location.

C. Industry inspection programs are being developed. The National Cargo Bureau for example, is preparing a fishing vessel inspection program utilizing the Coast Guard voluntary standards. In addition, more owners are showing interest in having their vessels classed. In response to this interest, Det Norske Veritas, the Norwegian Classification Society, has opened an office in Seattle.

The training activities have had an immediate impact. Four vessels in the Pacific Northwest had serious fires in recent months. Crews on those vessels were able to suppress the fires themselves, or contain them until additional help could arrive. In all four cases the crews had received firefighting training in the NPFVOA program.

We are seeing similar safety activities taking place throughout the United States:

A. Texas A&M University Marine Advisory Service is preparing a video tape training program for use by vessel owners in the gulf shrimp fleet.

B. The University of Hawaii Marine Advisory Service is considering customizing the vessel safety manual for their regional fishery.

C. There is interest by the private sector in translating the vessel safety manual into Vietnamese for that segment of the gulf fleet operators.

D. The safety manual and voluntary standards are being adopted by:

1. The Southeast Fisheries Association,
2. The Point Judith (RI) Fishermen's Coop, and
3. The North Pacific Fishing Vessel Owners' Association.

E. The first small fishing vessel built to the voluntary standards is a New England lobster boat, showing the practicability even for small vessels.

F. Fishing safety programs are being developed by State sponsored agencies and institutions in Maine, New Jersey and North Carolina.

G. Private training school now exist which specialize in fishing vessel safety programs.

H. Virtually every major fishing industry trade show in the United States has devoted space and time to presentations and seminars on fishing vessel safety and the voluntary standards and education program.

I. We are receiving a continuous stream of requests for copies of the vessel standards from naval architects, builders, owners and operators, associations, attorneys and insurance agents.

J. We are having discussions with non-profit organizations in the Northeast and Gulf States who want to produce training programs and editions of the vessel safety manual "Customized" for those regional fisheries. The National Oceanic and Atmospheric Administration has been an active participant in the this effort with the Coast Guard.

Interest in our program has also been expressed by the international community including nations with fully regulated fisheries. We recently presented an information paper at the International Maritime Organization, and distributed copies of our vessel standards and vessel safety manual to 130 member nations. The Coast Guard program has been very well received and great interest has been shown. Norway for example is recommending its use by their fishing fleet.

Speaking to S. 849 directly:

S. 849 contains requirements for safety equipment. Having safety equipment aboard will improve chances for survivability, and this same equipment is recommended in the voluntary program. Therefore we support the equipment requirements in S. 849. Earlier this month the Coast Guard also published a notice of proposed rulemaking regarding the carriage of emergency position indicating radio beacons (EPIRBS) on uninspected fishing vessels operating on the high seas. We believe this effort will provide effective alerting and locating signals for fishing vessel casualties.

However, we do not think that equipment regulations are sufficient by themselves. We know that fishermen must be interested in, aware of, and trained in the use of this equipment for it to be effective. We know from casualty investigations that lives have been lost aboard well equipped vessels due to lack of instruction and practice in the use of equipment. The ability of the crews to contain the fires on the Pacific Northwest vessels is a good example of the importance of operational training. Existing regulations require firefighting equipment on board fishing vessels, but it is the training that allowed the crews to fight the fires effectively. It is important to note that the training these crews received was set up by an industry group using the voluntary program.

S. 849 also requires establishment of stability regulations. The Coast Guard's voluntary stability standards exceed those of the Torremolinos Convention. However, as with equipment requirements, merely requiring that stability standards be adopted does not guarantee safety. There is no design standard that will ensure a safe vessel regardless of the way it is loaded and operated. Fishermen have to be motivated to understand and pay attention to the manner in which they load and operate their vessels. We think that the voluntary program offers the fishermen that opportunity to get involved in the development of stability standards and the means of presenting stability information so it is useful.

S. 849 further allows the Secretary to accept an insurers certificate of compliance with stability regulations. The Coast Guard will have a continuing responsibility for oversight, and will be required to perform the stability analysis for those owners who choose not to verify compliance through an insurer, or who do not carry insurance. If this section is enacted, the Coast Guard would also require authority to allow delegation to the private sector.

Additionally, S. 849 provides for termination of unsafe operations. This would be a major and potentially costly change in policy since no commercial vessels are now subject to termination. Termination may require escort of the unsafe vessel to the nearest port. While the operation of recreational boats can be terminated, and the escort time is generally short, terminating the operation of a fishing vessel could occasionally require several days of escort. A change in policy of this magnitude could divert resources now used for search and rescue, drug interdiction, fisheries law enforcement, and other duties.

S. 849 establishes an advisory committee. We have found no difficulty communicating with the industry through its existing trade associations. We do not think the proposed advisory committee, as large as it is, can adequately represent the wide diversity of the industry. We think it will be a costly and unnecessary new umbrella group.

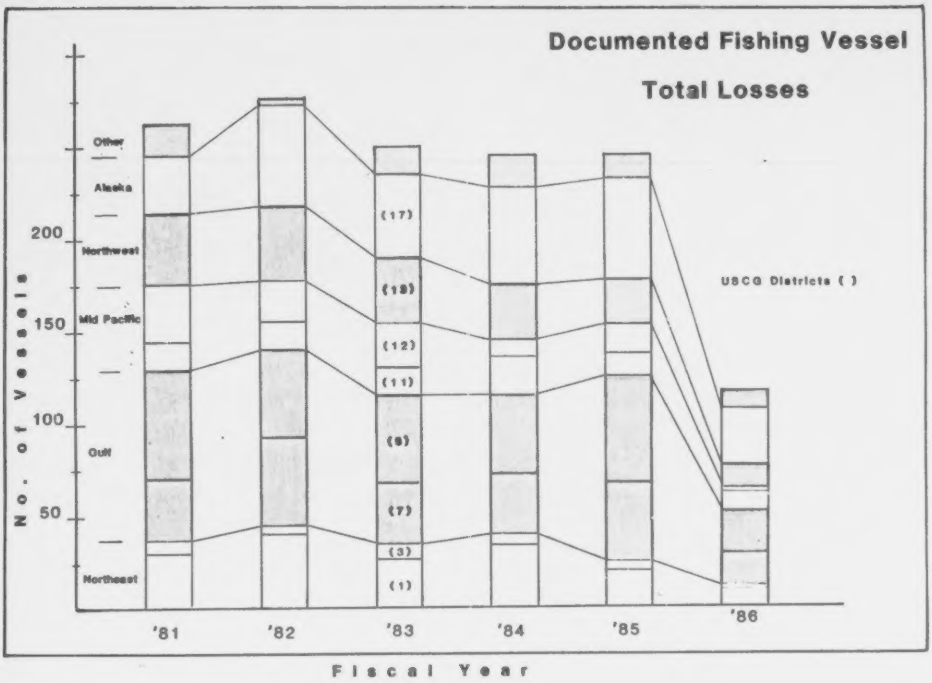
S. 849 also establishes recordkeeping and reporting requirements for insurance companies. We support this requirement.

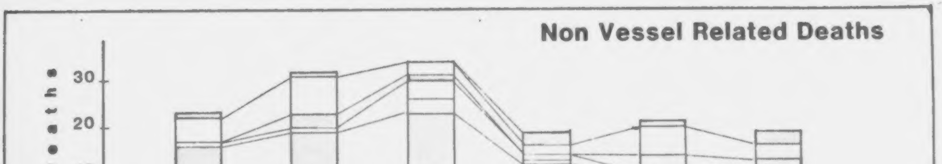
During last year's testimony on H.R. 5013 "Commercial Fishing Industry Vessel Safety Act of 1986," Rear Admiral Kime described previous Coast Guard efforts to regulate the fishing industry and the way we and the Secretary of Transportation initiated our current voluntary safety program. He also noted that our position on fishing vessel safety has been influenced by many factors. The domestic fleet is comprised of relatively small vessels operating in an unforgiving environment that can overwhelm even the safest vessel. Those who crew on fishing vessels are employees and not innocent passengers. They are traditionally independent. They transport their own catch in their own vessels and share in the profits and losses of each trip. Any safety program for this group must be flexible enough to permit operators to make operational decisions that they alone are in the best position to make. It also must have the support of the fishermen to be effective.

At this time, safety is a concern of the fisherman. Fishermen in a cooperative will police each other because losses of any member of the cooperative will cost them money. We cannot monitor and influence performance as continuously and effectively as fishermen police each other through peer pressure.

We remain convinced that the voluntary approach is a viable program. Even though the voluntary program is in its infancy, the number of activities being undertaken by the industry and the decline in the casualty statistics for the first year under the program are very encouraging. All this is happening without a major investment of government resources. The majority of the cost of improving fishing vessel safety is being voluntarily borne by the industry itself and not the taxpayer. This is in keeping with the President's philosophy of minimizing Government regulation of the private sector. Let's give it a chance.

That concludes my prepared testimony, Mr. Chairman. I will be pleased to answer any questions you may have.


Documented Fishing Vessel
Total Losses
No. of Vessels
50
100
150
200
Other
Alaska
Northwest
Mid Pacific
Gulf
Northeast
(17)
(13)
(12)
(11)
(9)
(7)
(3)
(1)
USCG Districts ( )
'81
'82
'83
'84
'85
'86
Fiscal Year


Non Vessel Related Deaths
Deaths
10
20
30
Documented Fishing Vessel
Related Deaths
Deaths
20
40
60
Other
Alaska
Northwest
Mid Pacific
Gulf
Northeast
(17)
(13)
(12)
(11)
(8)
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'81
'82
'83
'84
'85
'86
Fiscal Year
USCG Districts ( )

Senator KERRY. Thank you very much, Captain. We appreciate it.

Mr. Douglas.

Mr. DOUGLAS. Thank you, Mr. Chairman.

I am James E. Douglas, Jr., the Acting Deputy Assistant Administrator for Fisheries for the National Oceanic and Atmospheric Administration in the Department of Commerce. My written statement is before you. It is brief, and I will use even greater brevity in summarizing it.

Basically, the bill has four sections. We support Section 101, which would bar civil actions for temporary illness or injury where adequate maintenance and cure is provided.

We support Section 102, which is a two year statute of limitations.

We also support Section 202 which would require better reporting of casualty data.

We support greater safety in our nation's fishing fleet, which is the intent of Section 201. However, we defer to the Department of Transportation and the Coast Guard on how this can best be accomplished. Thus, we leave discussion of Section 201 to them.

Mr. Chairman, NOAA believes that the provisions of this bill represent a reasonable alternative to the present intolerable insurance situation in the fishing industry. We think the provisions of this bill should bring greater safety to the fishing industry and greater predictability to claims for temporary injury in what is certainly at its best a very dangerous industry.

We believe that with actions such as contemplated in this bill, the private insurance industry would be less hesitant to seek the business of the fishing industry. It would be a step forward.

That concludes my remarks, and I will be glad to answer any questions you may have.

[The statement follows:]

## STATEMENT OF JAMES E. DOUGLAS, JR., ACTING DEPUTY ASSISTANT ADMINISTRATOR FOR FISHERIES NATIONAL MARINE FISHERIES SERVICE, NOAA

Mr. Chairman and Members of the Committee: My name is James E. Douglas, Jr. I am the Acting Deputy Assistant Administrator for Fisheries of the National Oceanic and Atmospheric Administration, Department of Commerce. I am pleased to present the Commerce Department's views on S. 849, the "Commercial Fishing Industry Vessel Safety and Compensation Act of 1987."

Fishing is an inherently dangerous enterprise. The operation of heavy equipment on small production platforms in an often tumultuous marine environment means a potential for high casualty rates. Everyone—the fishing industry, the insurance industry, and a Government concerned about the well-being of seafarers—must accept this reality.

Prudent fishing vessel operators know that casualties cost them money—both in lost production potential and increased insurance premiums. There is a growing awareness in the fishing industry of the economic incentives and, as a result, the fishing industry is demonstrating an increasing commitment to safer operations. This commitment may well be the best hope for safer fishing operations.

Although we support improving fishing vessel safety, we defer to the Department of Transportation about how this can best be accomplished. However, there are some provisions of S. 849 upon which we have some comment.

We support section 202 of S. 849 which would provide for better fisheries casualty data. Insufficient data have been a major problem both in determining what the real risks are and where safety-improvement and loss-control efforts should be concentrated. Real-time, rather than periodic, data would, however, be more useful to everyone, and more conducive to a claims-adjustment process which includes data submission as a normal part of the adjustment process. Also, care must be taken to assure that the data characterize the nature and cause of casualties sufficiently to be a useful guide to remedial action.

We also support section 101 which would bar civil actions for crewmen's temporary illness, injury, or disability where adequate maintenance and cure were provided. In view of the strict liability imposed by maritime law, we believe this is a reasonable alternative to what otherwise would be the access of temporarily injured crewmen to jury awards for non-economic damages. We believe this recognizes that crewmen on fishing vessels are in many respects co-venturers with vessel operators in a dangerous enterprise. Such a change would decrease the uncertainty faced by a marine insurance industry which already regards fishing risks unfavorably.

Finally, we support section 102 which would establish a two-year statute of limitation for the recovery of crewmen's damages. Again, this would decrease the uncertainty faced by fisheries underwriters.

Mr. Chairman, that concludes my prepared remarks. I will be pleased to answer any questions you or other Members of the Committee may have. Thank you.

Senator **Kerry**. Thank you very much, Mr. Douglas, and we certainly appreciate your ability to summarize and pull it together very quickly, and I think that is helpful to us here.

Let me begin, Captain Piche, if I may, in S. 849 we established safety requirements for documented fishing vessels outside of the boundary line. Now, I understand the term boundary line was inserted at the request of the Coast Guard, and I wonder if you would refresh our memory and explain why you prefer the use of the term boundary line instead of, for example, territorial waters or baseline. If you could define those terms for the record, I think that would be helpful for us as we proceed.

Captain **Piche**. The boundary line, sir, is already defined in regulation and law, and it is well known. It is basically where inland water turn into ocean waters. In many areas it is the three mile limit. In some areas, up in Alaska, it comes right in to shore. In each area it is slightly different. The Gulf is even a different one.

Senator **Kerry**. Do the charts reflect where the boundary line is?

Captain **Piche**. No, sir, the charts do not.

Senator **Kerry**. Would it be advisable, do you think, to have charts reflect that so that they would be available to fishermen? Would that be helpful in the process?

Captain **Piche**. I do not think that would add, sir. Many fishermen do not use charts.

Senator **Kerry**. I wonder if that ought to be part of it.

Moving then from that question, let me move into the safety area because that is the next area I want to go, and maybe the use of charts is part of the safety area requirements.

Some advocates with respect to this legislation are telling us that we ought to require licensing of fishing industry vessel operators, and we ought to require training of crew members in safety procedures.

Now, to assist us in beginning to even evaluate that, I would like to hear from you as to what you—can you give us an estimate right now of the number of vessel operators and crew members currently employed in the industry? Do you know that?

Captain **Piche**. Sir, for the licensing, we have used the number of approximately 100,000 fishermen would need to get a license in order to have enough to have relief mates and captains for the some 33,000 U.S. documented fishing vessels. That does not include the state vessels.

Senator **Kerry**. Go ahead.

Captain **Piche**. I just said that approximately 100,000 fishermen would need a license to keep a licensed operator at all times and have a relief for the some 33,000 U.S. documented vessels, and that does not include the state vessels. The states do not keep track of them by fishing or not.

Senator **Kerry**. So if there were to be some kind of licensing requirement, how soon would the Coast Guard be able to in effect implement such a program, do you think?

Could it?

Captain **Piche**. Yes, sir. It would certainly take more resources than we have dedicated now to that.

Senator **Kerry**. Do you have a sense of how much more resource?

Captain **Piche**. Not at my fingertips, no, sir. I am sorry.

Senator **Kerry**. It might be interesting if you could try to figure that out and give us the scope so we can have a little better sense of where we are going as we mark up this bill, both in dollars and cents as well as personnel. I think that would be good.

Captain **Piche**. In that regard, sir, we felt that probably if the licensing were to come, that all fishermen currently considered captains would be grandfathered in, and the renewal on those licenses would be two to four years, depending on how it went, and that would take at least another four to five years before all fishermen could be examined and actually get the license.

The licenses are available today, and I might add it is a minimal license. The requirements are minimal.

Senator **Kerry**. Do you have a breakdown on what proportion of the accidents are caused by human error?

Captain **Piche**. We have directly attributed human error to over 50 percent of the casualties, and we have human error involvement in at least 80 percent by our estimates.

Senator **Kerry**. Now, there is a section in here, section 4502(c), which refers to the enactment date by which certain vessels would be exempted and those which would be included. The National Transportation Safety Board in their written testimony suggests that the legislation could be improved by removing the December 31, 1987 inclusion date.

Would you comment on that?

Captain **Piche**. Removing so that——

Senator **Kerry**. Removing the date, which I presume has the effect of meaning all vessels at that point would then be—there would be no exemption.

Captain **Piche**. The requirements for the vessels, the equipment requirements probably could be met in that time frame. Those vessels that needed a stability analysis, it would be extremely difficult, if not impossible, for them to comply.

Senator **Kerry**. Therefore, you would prefer to see the date remain what it is. You think that is more administratable.

Captain **Piche**. Yes, sir.

Senator **Kerry**. In the past, the Coast Guard has supported voluntary compliance with basic safety standards and opposed a legislatively mandated set of measures. Now you are supporting Title II of Senate 849, and obviously we welcome that change in position. But I wonder if you could tell us how you arrived at that.

Captain PICHE. S. 849 gets at two of the key items in our voluntary program. One is having on board the survival equipment that we recommend in our voluntary program and which many, many of the current fishing vessels already have taken steps to have on board. It also tries to get at the area of stability. Fishermen generally make many changes to their vessel after it is designed and built without taking into account how that affects stability. And stability is a problem. However, the vessels we are talking about, generally under 130 feet, are capable of being overwhelmed in the environment out there even if they met any of these criteria that we already recommend.

If it is not loaded correctly and they do not follow what the designer has laid out for them, then they are putting themselves in even more jeopardy.

Senator KERRY. Now, you are basing the safety provisions on the size of the vessel rather than area of operation. That means that the situation exists or could exist where you have smaller boats operating in the same treacherous waters as larger ships, correct?

Captain PICHE. Yes, sir.

Senator KERRY. But no additional safety measures are going to be required for those smaller boats.

Is that a problem, and if so, is there anything that could be done to alleviate it?

Captain PICHE. We have recommended that our voluntary program and the standards that we have put out be applied to fishing vessels across the board, no matter what size. There are certainly some provisions that would not apply to the smaller vessels because lifeboats and things of that nature just do not fit.

We think that the voluntary standards are pretty comprehensive. We wanted to take an entire approach and get at the areas where our investigations show are the main areas that cause fishermen problems.

The vessels today, if I can just take a second, the vessels today, there are many new ones out there. Maybe 50 percent of the fleet is less than ten years old now. Since the Magnuson Act the numbers have increased dramatically. These vessels are well designed, well built, and for the most part well equipped.

Most of the problems get into the fact that changes have been made and that fishermen operate the vessels without having adequate information or adequate training on some of the equipment. Thus, they do not realize the dangers that they place themselves in.

We feel that with the diversity, from Maine to the Gulf to the Pacific and then up in Alaska fishing areas where the vessels are different, the sizes are different, the people fish differently, that there is no one actual regulation or law that can apply adequately to all; that to go the voluntary route, take an active role in getting fishermen involved, and if the fisherman believes in that, then we will see dramatic changes in the statistics.

Senator KERRY. Are fishing vessels required to have exposure suits?

Captain PICHE. No, sir, not at this time. They may substitute the required life jackets with exposure suits if they desire.

Senator KERRY. What type of vessels are required to have exposure suits?

Captain PICHE. Those are the large commercial vessels.

Senator KERRY. Within the context of the voluntary program, have you had a spot check kind of program where you are able to ascertain the level of compliance voluntarily?

Captain PICHE. We have asked our marine safety officers located around the country to get involved as time, resources and mission permit, with the fishermen, if there is an interest, and we have found interest in many ports.

Senator KERRY. But do you have any formal gathering of information by which you can measure the effectiveness of the voluntary program?

Captain PICHE. We are, if you will excuse the term, institutionalizing the fishing vessel program in the Coast Guard through a Commandant's directive that will direct all the Coast Guard people who have contact with fishermen and casualties to summarize what happened there, and what parts of the voluntary program were followed, and if it was effective or not effective, and what changes we may make to our program to improve it.

Senator KERRY. But at this moment in time you cannot share with the committee and evaluation that says the voluntary program works, does not work, it is 50 percent effective or whichever.

Captain PICHE. We cannot say that from the voluntary standpoint. I think we can say, as all, that the focus that has been on safety through the insurance business in the last two to three years has certainly raised the awareness level among the fishing fleet that safety is a problem, that they do have a problem, and they need to pay attention to it. And I think that alone will improve the statistics, just the fact that they think safety is a problem.

Senator KERRY. You have put in how many years as a Captain, about 15 years now?

Captain PICHE. Twenty-three, sir.

Senator KERRY. Twenty-three years, all right.

And in 23 years, how much of that time has been involved in some way or directly with fishing vessel safety?

Captain PICHE. Fising vessel safety, per se, only the last three years. I have been involved with vessel safety of all types and sizes since 1970.

Senator KERRY. Based on your experience, because I think the core issue here that we are trying to get at as legislators in fashioning this bill, this legislation, is really to be helpful, not to create an albatross from the Federal Government that is somehow going to create more problems.

Based on your experience, is it your opinion that without any question there are some measures and requirements regarding safety that could reduce liability and could reduce the prevalence of accidents to occur at sea in fishing?

Captain PICHE. Absolutely, yes, sir.

Senator KERRY. Do you think this bill addresses those?

Captain PICHE. I think it is a start. I think it addresses some of the key survival items. Excuse the term again, but it kind of is the

Bandaid, if you will, the first aid part of safety. It is after the things have happened, this is going to enable the fishermen to survive.

The Coast Guard emphasis with our program is on the front end of preventing it from happening in the first place, through the training, through the stability work as we have approached it, and just to raise the level of awareness.

Senator KERRY. Let me turn to my colleague Senator Chafee and give him a round.

Senator CHAFEE. Thank you, Mr. Chairman.

Captain, do you believe that there are dramatic variations of the dangers off the various coasts of the United States, in other words, the North Atlantic dangers are different from perhaps the Mid Atlantic or the Gulf Coast, and with perhaps the North Pacific being the most dangerous?

Does your experience come to any conclusions?

Also, a lot of it is due to the type of fishing that is done. In other words, in our area they only go out for about three days whereas I assume there are longer voyages in the North Pacific.

Captain PICHE. The environment is certainly different, you are correct on that.

Our statistics—and again, I am looking at vessel losses and the deaths—show that the distribution around all the fishing areas is pretty much the same if you take into account the number of vessels there. The type of thing that happens is quite different.

If you take the Gulf, for instance, the death rate—in fact, the number of deaths in 1986 was greater there than they were up off the Alaska. Generally, there, it is the one person falls overboard type of accident, and drowns; where in Alaska, with the extreme environments, we find that is where we lose the vessel in its entirety and all the crew. Generally those are the ones that make the newspaper and we hear about. The one man falls overboard generally does not make the newspaper, and those numbers start to accumulate in our statistics but do not show up as you might find them.

Senator CHAFEE. So there is not such a variation. There is a variation in the type of accident, in other words, the loss of the vessel versus the loss of the individual, but the totals as a percentage of vessels operating out of each port are about the same?

Captain PICHE. Yes, sir, that is what our statistics, and we have kept them since 1970, generally show. Alaska is the worst, but they also have the most number of vessels operating in that area.

Senator CHAFEE. Mr. Douglas, you have testified that one of the great needs is greater accident data and statistics. Yet Captain Piche has indicated that they have statistics.

Do you folks coordinate? In other words, do you see the Coast Guard statistics?

Mr. DOUGLAS. NOAA does not keep statistics, but what we have done, Senator, is assist a third party, which is the National Council on Fishing Vessel Safety and Insurance. There has been an effort to try to collate data on accidents in addition to what the Coast Guard is currently doing, to try to get more at the cause of that accident as a matter of interest to the insurance industry who needs information on not just the macrodata which the Coast

Guard is dealing with, but also to delve more into the cause of accidents.

We believe that that is very important, that the data that comes in on accidents be of such a nature that it can identify the cause, and that it be real time data. It does not do you much good to get data that is a year or two years old if you are in the insurance industry and trying to adjust for the accuracy of what is happening out there.

Senator CHAFEE. Well, how would you suggest you get more data? I mean, I know that the fishermen, I suspect they will say we just do not want any more paperwork.

Can there not be some rather simple forms that they can fill in when there is an accident? Maybe they do not want to report accidents.

Mr. DOUGLAS. Well, we are supporting that provision of the legislation that would make it mandatory that folks report accidents.

Now, with respect to the forms we would work with the Coast Guard. Probably it would even be the Coast Guard that would deal with that specifically.

From NOAA's point of view, we are dealing more with the theory that you have to have this kind of data and it has to be of a certain specificity in order for you really to be able to get at the cause of accidents.

This is not just loss of life, but when you mangle a hand or something, was it done in a certain type of winch under certain conditions so that we know to improve the working conditions on deck. Those are the kinds of things we need to know as well.

So we are talking about a wide range of things where I think you have to have a rather sophisticated data collection scheme, and certainly a way to manipulate it once you get it back into someone's computer.

Senator CHAFEE. Captain Piche, in your previous testimony, you have indicated the Coast Guard did not support mandatory inspection of all vessels or requirements for crew training and licensing of operators. It is my understanding that Mr. Lowery has introduced legislation to that effect in the House of Representatives.

Could you amplify a little bit on the Coast Guard's position, and whether you think that the safety provisions of S. 849 are adequate. You indicated that this is a Bandaid, a start.

I would be interested in your position a little fuller on that matter.

Captain PICHE. Yes, sir. If I might just take one second to address the data. There is already the requirement for commercial vessels to report casualties, accidents, if there is an injury that exceeds 72 hours, is a death or $25,000 in damages. Generally that is only reported, though, if the Coast Guard is involved in a search and rescue case or somehow involved. The form is simple; it is a one-pager. But it is generally not used in the fishing industry. For the rest of the commercial fleets, it is pretty accurate.

With regard to inspection and licensing, with inspection, as I mentioned, many of the vessels that we already see now out there, and there are exceptions, but for the most part they would meet any of the requirements that our mandatory inspection would require at this time.

If I might use the European analogy again here, in talking with them, their feeling is, and I guess it is our feeling, and they have more facts than we do, they do certify their vessels. Every two to three years, they go down and make the inspection. They hang that piece of paper on the bulkhead of the ship, and the fisherman goes off and does his thing just the way he has always done it because the feeling is I passed that government thing, I am safe, and I will go do it.

The Coast Guard are not police. We are not sitting at the corner looking to catch everybody. Generally we respond; when somebody has a problem, we go out and do our best to help them. And on the preventive end, we try for passenger vessels, LNG ships, those type, very complicated vessels, we do go aboard and make sure they meet a very rigid set of regulations. However, we felt that the amount of personnel and resources that it would take to inspect the vessels would not yield a great benefit on the other end. It may catch a few and put a few of the rogues out of business, if you will, but then again, we would only be down there once every two or three years, and in one year or two years time a vessel can easily be downgraded, if you will, from what it met when we were first aboard.

When we go aboard we check them and make them comply and bring up their standards, but after that we do not revisit the vessel except for on the scheduled time period.

Senator CHAFEE. I am sympathetic to the point Senator Stevens is making, that their vessels could be several hundred or a thousand miles from where the Coast Guard is and be waiting and waiting in port for the Coast Guard to come. And so I can understand the licensing and the inspection requirements that he is discussing.

Could you talk a little bit about the operating stability? Does that fall under the same answer that you just gave? You can have a vessel that has proper operating stability, but as soon as they have got the certificate they go off and shift their equipment in such a fashion that the vessel becomes top-heavy or they do not operate it in a proper manner?

Is that your concern?

Captain PICHE. Yes. With regard to stability, I would say that every vessel when it is designed and built, the operator should be given operating instructions on how to load that vessel and how to operate that vessel. When changes are made, even though they may feel just the adding of a one ton winch or something is no big deal, or they decide, as we have seen, that we can flood all of our fish tanks and we will cross-connect them, they do not understand, because it is a naval architecture term, what that does to their vessel in decreasing the stability.

So we are making our efforts in trying to develop an effective stability criteria for small vessels, and we are working with the Society of Naval Architects and Marine Engineers and their panel to try to develop simplified instructions that can be given to the fishermen, the operator, on stability, because it's a very complex thing.

And when we start talking in terms of metacentric heights and KG's, we lose the fishermen immediately. We need to make this a visual presentation, something that they can understand.

And the Scottish have come over and given us some real good hints on how to approach that from the way they do it. It is a visual thing. It may restrict a little bit the fisherman's ability to load his vessel, but it will make him a lot safer if he follows that type thing.

Senator CHAFEE. So thank you, Mr. Chairman.

Senator KERRY. You raised one issue on the concern of Senator Stevens about the distance traveling for licensing. I think you said in your testimony that you endorse the concept of a third party, is that correct? Did that apply to that licensing process or not?

Captain PICHE. Not to the license.

Senator KERRY. Would that be possible? How do we deal with that issue?

Captain PICHE. The licensing becomes the—if there were licensing, it becomes the ability for the person to make a living and that would become the hammer, if you will.

Senator KERRY. These folks have a legitimate worry that they are not going to get someone there on time when they need it and they are scheduled to go out. They have to wait weeks before they are even able to do it. They do not want to be sitting in port.

Is that a realistic fear?

Captain PICHE. The licensing is an examination program, and we the Coast Guard feel that it must be kept secure. And that is what we have done with our other licensing programs. Many organizations prepare the people to take the exam. They offer courses, and they learn a lot more there than what they need for the examination.

Senator KERRY. We are talking about vessel safety inspection. What about the inspection?

Captain PICHE. Our feeling on that is that most of the vessels are not outrightly owned by the fishermen. They have a mortgage and the mortgage company as part of that requirement that it be insured. And insurance companies generally require it to be surveyed.

The breakdown is the insurance company allows the fisherman to get his survey from whomever he wishes. It's the Coast Guard's feeling that if they were to take the type of standards that we are putting out and the insurance company says, you go get a survey in accordance with this particular standard and have it mailed in to me, then I will give you the insurance, that is the kind of third party inspection that can be done.

And it is an annual then and not just, as the Coast Guard catches it, once every two or three years.

Senator KERRY. And presumably, if there is a large fishing industry in a port then they are going to have those people right there and they can get it done on time, and it is in everybody's interest.

Captain PICHE. The surveyors are there. Again, the surveyors are not licensed, either. If they were given the guidelines established across the board, around the country, then that would give them something to follow.

Senator CHAFEE. What amazes me in all of this is that the law of self-interest does not work to a greater extent. These vessels are very expensive. You would think the owner would be cautious with his vessel, and if 250 vessels are lost a year that is a tremendous loss by the owner of the vessel or the owners of the vessel.

And you would think they would want to operate these vessels. And in addition to loss of lives, frequently the skipper loses his life. You would think that the law of self-preservation would function here. But maybe the desire to cram a few more hundred pounds of fish on the vessel is the law of self-interest functioning the other way.

Well, I want to thank you, Mr. Chairman.

Senator KERRY. Thank you very much.

I do have a couple of other questions. We have gone a little longer with this panel than I had intended. But just very quickly, what percentage of the fishing industry is presently in compliance with the safety regulations that are embodied in title 2 of the bill?

Captain PICHE. I would just be hazarding a guess. But what I understand, I would say it is somewhere in the vicinity of 50 percent with regard to the equipment, the EPIRBS and the survival suits; and to a lesser extent, the life rafts.

Senator KERRY. Mr. Douglas, what changes would you make in this as we mark it up? Specifically, would you make——

Mr. DOUGLAS. Well, we are happy with it as we see it.

Senator KERRY. You are suggesting as we see it with the House changes?

Mr. DOUGLAS. No, sir. Our testimony is relative to your bill as it now stands.

Senator KERRY. Have you seen the House changes?

Mr. DOUGLAS. Yes, sir. I looked at it last night. I had a moment with my attorney this morning. I could give you some personal thoughts on it, but obviously with that time frame there has been nothing cleared through other parties.

One of the things I could say to you is that we can raise a lot of questions. I do not know that we have some of the answers, but maybe just by raising some questions for you, you can talk to your counterparts in the House and find out what they had in mind when they made some of the changes.

Senator KERRY. Fair enough. But we would obviously like to have recommendations made with the notion of what you find as de minimis for your approval, because we want to get the parties together on this.

Mr. DOUGLAS. We would be happy to do that.

Senator KERRY. Thank you very much.

Senator CHAFEE. Mr. Chairman, could I ask one other quick question of Captain Piche.

What is a fishing vessel? Are those lobster boats that operate out of Korea and Maine or in Prospect Harbor or whatever it might be, with the owner-lobstermen on board, is that a fishing vessel?

Captain PICHE. Yes, sir, it is considered a commercial fishing vessel. He would not probably appear in our statistic, though, because he's probably state numbered.

Senator CHAFEE. That is right, he would be state numbered. So when you talk fishing vessels in the statistics of the losses, would those be the 33,000 documented vessels that you discussed?

Captain PICHE. They would not be included in that, no, sir. The state ones would not.

Senator CHAFEE. What is the difference between—what makes a state license versus a documented vessel?

Captain PICHE. When you get greater than five gross tons, you are eligible to be Federally documented and put your haling port, instead of having numbers, down the side of the vessel.

The smaller vessels—and it is generally those lobster vessels—are not eligible to get the Federal documents, so they have to go to the state.

Senator CHAFEE. Thank you very much.

Gentlemen, we appreciate your presence here enormously and look forward to working with you on this. I thank you.

Panel two is going to be panel three. We are just flipping because of some time problems. So if Mr. Jim Costakes could come up. Mr. Costakes, I personally am delighted to be able to welcome you here. We had the good occasion to meet during the recess when I was touring the state and we had a good meeting, and I thank you for helping to make that possible.

It was very instructive for me, and I am delighted that you can be here with us this morning.

If you would state your name and who you represent for the record, and then if you could give us a summary we would appreciate it.

## STATEMENT OF JAMES COSTAKES, NEW BEDFORD SEAFOOD PRODUCERS ASSOCIATION

Mr. COSTAKES. Thank you, Mr. Chairman and members of the committee.

My name is Jim Costakes and I am general manager of the Seafood Producers Association. I am testifying today as chairman of the Fishermen's Alliance for Insurance Reform. My full written testimony has been submitted for the record and I will just summarize that testimony.

The Fishermen's Alliance for Insurance Reform is an ad hoc coalition of trade associations in the fishing industry that have joined together to seek a more equitable compensation system for injured fishermen. Eighteen commercial fishing associations and additional interested groups and individuals support our testimony.

FAIR supports the comprehensive approach taken by S. 849 to address fishing vessel compensation and safety. We recommend, however, that the following amendments be made to strengthen and clarify its provisions.

Whether an injury is permanent or temporary is a question primarily for medical evaluation and should be determined by expert members of the medical profession. We recommend that as a precondition to suing for permanent injury damages, the injury, illness, or disability has been examined by three licensed physicians, with two of these physicians concurring that the injury, illness, or disability is permanent.

Tax-free maintenance payments of 80 percent of lost wages could provide an injured fisherman with income in excess of that amount he would make when working. We are concerned that under these circumstances there would be no incentive for fishermen to return to work and claims of prolonged disability and abuse could occur.

We recommend, therefore, that this part of the maintenance formula be set at 66⅔ percent of lost wages. This is consistent with other Federal and state compensation programs, and would provide an injured fishermen with almost the equivalent of his after-tax working wage.

We support the maintenance level of $30 per day established in S. 849. We also support a one year statute of limitations and a 30 day notice of injury requirement.

FAIR supports the general safety provisions in S. 849, and we recommend that certain provisions come into effect 18 months after publication of implementing regulations and that standards be developed under which enforcement officers may order vessels to return to port.

That is a summary of my testimony, Mr. Chairman.

Senator KERRY. Thank you very much, and I thank you for again also making it succinct. I was just asking a question about your one year limitation, because we now have a one year, two year in the Senate, and three year in the House. So we are obviously going around on that.

Let me ask you quickly the question that I asked Captain Piche at the end about the number of fishing vessels that are in compliance with the safety standards mandated in title 2. Could you give me your estimate of the number of fishing vessels that you think right now are in compliance with those safety standard?

Mr. COSTAKES. Well, speaking for the Port of New Bedford, I would say virtually almost 100 percent of those things are required or mandatory.

Senator KERRY. Of title 2?

Mr. COSTAKES. Of title 2.

Senator KERRY. They are in compliance now?

Mr. COSTAKES. Yes.

Senator KERRY. Do you have knowledge of other sectors of the country?

Mr. COSTAKES. No, I do not, not really.

Senator KERRY. Then we will wait and hear from others on that.

Mr. COSTAKES. I think one of the problems there, Senator, is the fact that the size of the vessels in comparison with some of the other areas makes it very difficult to do that.

Senator KERRY. Do you think this bill goes far enough to ensure safer commercial fishing?

Mr. COSTAKES. I think the bill goes far enough, I think, if it is mandatory. I think if it is a sense where I think in the past two or three years, like Commander Piche, Captain Piche, indicated, right now you have a lot of insurance clubs going on throughout the country. Insurance agencies themselves are requiring surveys on a constant basis. The clubs being formed are constantly banging on these vessels.

Senator KERRY. If all of that is happening, why aren't the costs going down?

Mr. COSTAKES. That is really something I cannot answer, except for the fact that——

Senator KERRY. Well, there are more accidents, are there not?

Mr. COSTAKES. Well, not necessarily. I think the fact of the matter is, from my understanding, is sometimes you can go three or four years before you can catch up to the money level that is being doled out to the insurance companies.

Senator **Kerry**. But just talking about vessels lost, Senator Chafee has pointed out and I think I pointed out and others have pointed out there were up to 300 vessels lost in one year.

Mr. **Costakes**. I have a very difficult time trying to understand. I think I would like to see a little more specific details as to the types of vessels they were and the types of situations.

My feeling is I am talking from the Port of New Bedford. You can count on your hands in the last 20 years how many vessels that were lost. So I am not aware of throughout the country what is happening or the kind of vessels you are talking about, whether it is a one man boat, two man boat, large vessels. I do not know.

Senator **Kerry**. You have heard me raise the issue about those who are asking for licensing the vessel operators. What proportion of the accidents which occur at sea from your experience would you say are caused by errors of the vessel operators?

Mr. **Costakes**. That is kind of difficult to make a precise answer about, whether by vessel operators or not. I think everything is really done in a lot of cases on an intantaneous decision in some cases. And a lot of times it's just human error, whether the guy is more qualified than somebody else.

I think it is immaterial. At the time you get a weather report or you are steaming into shoal water, all of a sudden something brews up and you are in a position that you should not have been in.

Senator **Kerry**. But each of those are vessel operator choices, correct?

Mr. **Costakes**. Correct. Whether you are licensed or not is immaterial.

Senator **Kerry**. Well, both of us—I think Senator Chafee was in the Navy, am I right?

Senator **Chafee**. Marine Corps.

Senator **Kerry**. Well, that is a division of the Navy, as I remember it.

But also Secretary of the Navy. And certainly I remember the rigorous training that we went through before we were allowed to make any decisions on deck. It seems to me that there were benefits to learning the rules of the road and navigation and making judgments and so forth.

It seems to me that those judgments you talked about, about shoal water and storms and getting weather and making judgments, are things that we can have an impact on, are they not?

Mr. **Costakes**. Well, it is a little different, I think, Senator, than the Navy, quite different as a matter of fact. Training is completely different.

Senator **Kerry**. No, but what I am saying, I understand that the training is different. All I am suggesting is that the ability to read charts—we have heard testimony that a lot of people do not even use charts.

Mr. **Costakes**. Well, that is—I am dumbfounded by that statement, I am sorry.

Senator **Kerry**. But it seems to me that decisions about weather are, one, obviously a factor of experience, yes. But there are also things that one can learn. The question is are there some standards that can be applied in a licensing process which would make sense?

Mr. COSTAKES. Right now there is a fine if a vessel does not have a Coast Guard certification pamphlet or book. If you do not have that on board the vessel, there is a fine. And that gives you all the rules of the road, and gives you more information in that document, I think, than anyplace else.

So realistically, I think that that information is available to everybody at this point in time.

Senator KERRY. How do you feel about mandatory training of crew members?

Mr. COSTAKES. Well, I find it is going to be very, very difficult to implement something like that. I have a problem in trying to establish some criteria like that. We did that on our own several years ago, and just in a small port where we thought we could take care of it ourselves. We had mandatory CPR courses; we had a whole host of things.

But I will tell you, it was a nightmare just to try to get that together because of the vessels, the changing of crews. You have got vessels going out, and different crews on different vessels. It will take you quite a mastermind to figure out a program that you will be able to do this with.

I am not saying—it is not impossible. I am not saying that I am for it or against it. All I am saying is that I think it is going to be a major problem.

Senator KERRY. Now, you are suggesting in your recommendations you are concerned about the compensation at 80 percent of lost wages, right?

Mr. COSTAKES. Yes.

Senator KERRY. You have a feeling that could be a disincentive for fishermen to return to work, and you suggest a fixed rate.

Mr. COSTAKES. We suggested the 66⅔ rate, yes.

Senator KERRY. What happens, for example—I am told in the tuna industry a fixed rate of $30 would amount to less than 20 percent of the share a crewman could receive if working. How do you respond to that concern?

Mr. COSTAKES. I think geographically, if you were talking about a national program you have to take a lot of things into consideration about the wage scales in different areas of the country.

There are some people who are only making $12,000 a year. There are some of them making $60,000 a year on deck. So it is very difficult.

What we tried to do is come up with a compromise dollar number that is——

Senator KERRY. Does the bill not do that in the way that it addresses that question of regionalism, because the bill says 80 percent or $30, whichever is greater? It is giving the greater of the two.

If you came in with a fixed rate, you are sort of creating the problem that I think the bill is specifically trying to address. In other words, the bill is not $30; the bill is saying $3, which may in fact be more money than somebody is making, or 80 percent if in fact that is greater.

So you get whichever is greater.

Mr. **Costakes**. I think we are talking about the same thing. The only thing we are talking about is 66⅔ rather than the 80 percent.

Senator **Kerry**. All right. So you would be content as long as there is the ability to get the greater amount?

Mr. **Costakes**. Yes.

Senator **Kerry**. Senator Chafee.

Senator **Chafee**. Thank you, Mr. Chairman.

Mr. Costakes, one of the suggestions I suspect that will be made is that no one speaks for the crew members here.

That is, I looked over the list of those you are speaking for. You are speaking for the Alliance for Insurance Reform, and that includes the fishing vessel owners association, the North Pacific Fishing Vessel Owners Association.

Are there any organizations that the fishermen, in other words, the crew members, belong to? Do they belong to the—well, the Fishermens Association, the New Jersey Commercial Fishermen's Association?

Would that—crew members belong to that? Can you represent to us—you also speak for those who are the ones who are going to get the $32 or the 66⅔ or 80 percent or whatever it is?

Mr. **Costakes**. Well, I think what we're talking about here, Senator, is trying to establish a situation where it's going to be fair and equitable to somebody, including the fisherman.

And that's exactly—we—there are—some of these organizations have fishermen.

Senator **Chafee**. Now, when you say a fisherman, that would be what we might also refer to as a crew member as opposed to the owner and skipper or skipper and/or owner?

Mr. **Costakes**. Yes, but——

Senator **Chafee**. I suppose a skipper might well be—what percentage of your vessels are operated by their owners?

Mr. **Costakes**. I would say about 75 to 80 percent of my vessels are owner-operated vessels.

Senator **Chafee**. I see.

Mr. **Costakes**. So they are going out on those vessels.

Senator **Chafee**. All right, let me go on. I interrupted you.

Some of the crew members—do some of these organizations consist of crew members?

Mr. **Costakes**. I understand that some of them do, sir. I don't know exactly what number, but I understand that some of them do.

Senator **Chafee**. Well, for instance, up your way, the East Coast Fisheries Association, I'm not familiar with that.

Mr. **Costakes**. That, sir, is, I think, members from the mid-Atlantic area.

Senator **Chafee**. I see. Now, as I understand it, you've come before us with three specific suggestions.

The first is that in the panel to choose—to determine whether the injury is a temporary one, you suggest there be three physicians.

Is there any suggestion as to who chooses the physicians?

Mr. **Costakes**. I would think there would possibly be some formula we could use as far as whether it's the crewman or the vessel owner or the insurance company.

I am sure that there is some way we can set up a criteria for that.

Senator CHAFEE. You do not have a specific suggestion on that?

Mr. COSTAKES. No, I do not.

Senator CHAFEE. The next suggestion you have is about the 66⅔ as opposed to the 80 percent.

Your point being that 80 percent nontaxable frequently will end up with a larger sum than if the individual were working.

Your next point was, on the one-year statute of limitations, as opposed to two or three, and I think——

Mr. COSTAKES. The 30-day notice of injury, I think, is very, very important to us.

Some mandatory reporting than an injury has occurred on that vessel. This creates a major problem with us. We have no idea of an injury except that three months later we get a letter from an attorney saying, John Doe had an accident on your boat three months ago and we are suing you.

And you have no idea that any accident occurred; have no idea of what's going on; and I think it is very important that some sort of mandatory reporting of any accident should be in place.

Senator CHAFEE. Well, I can understand that. That seems to make sense.

I wonder what the difference is between the 30 days and three months, though? If you have been out on a voyage, and you come back, and I am particularly thinking in our area, you could have a crew man with you, and there could be three intervening voyages by the time the 30 days is up.

And he tells you in the October 29th, I really wrecked by back on October 1st when we were up off Georges Bank.

He never told the skipper. What's the difference between that and telling him six months later? Is that any help?

Mr. COSTAKES. One of the problems that occurs, like, if he goes on another vessel in two weeks, then he's on another vessel for two or three months, does he go back to the previous vessel he got hurt on?

Does he make a report to the vessel he's on now? So the guy that he's on the vessel now, he's going to take the brunt of whatever happens.

Senator CHAFEE. OK, I think those are constructive suggestions.

Thank you very much, Mr. Costakes. Thank you, Mr. Chairman.

Senator KERRY. Just a quick question. Why do you want to change the statute of limitations down to one? I can imagine why, but I would like to hear it for the record, what the rationale is.

Mr. COSTAKES. Well, we feel that one year—and I guess it is like everything else, what we are saying is because of the massive changes in a lot of these vessels, going from one vessel to the other, I think one year is a pretty sufficient time to know whether you have been hurt or not.

Senator KERRY. But sometimes for instance, well, you might not know whether you have a real impairment or permanent disability to some degree, necessarily; that could change over time.

It may take awhile to determine whether an injury is going to develop into that. I think we just have to try to balance that a little bit and think about it.

Do you have any suggestions on the specific language or specific ways to improve the definition of temporary injuries?

Mr. COSTAKES. Well, I will submit some testimony or written documentation. As a matter of fact, just as of yesterday, I guess, like Jim Douglas, looked at the draft, and I did not really have a chance to do that.

So we will be submitting——

Senator KERRY. That would be very helpful to us if you could give us some responses to that.

And we look forward to working with you on it over these next few weeks.

Thank you very, very much.

Senator CHAFEE. Could I ask just one more question, Mr. Chairman?

Mr. Costakes, what do you think about the advisory panel that is called for in here? Are you for it or against it? How do you feel?

Mr. COSTAKES. I have sort of a mixed reaction. I would be for it if you had some people from the industry on that panel, I would certainly support it.

But I get afraid of panels who don't have people that know about the industry, and I think there should be people on it, if there is going to be one.

Senator CHAFEE. Thank you very much.

Senator KERRY. Thank you for your help. We will look forward to working with you.

Thank you.

[The statement follows:]

### STATEMENT OF JAMES COSTAKES, CHAIRMAN, FISHERMEN'S ALLIANCE FOR INSURANCE REFORM

Good morning, Mr. Chairman and members of the Committee. My name is Jim Costakes. I am the General Manager of the New Bedford Seafood Producers Association.

I am testifying today as the Chairman of the Fishermen's Alliance for Insurance Reform (FAIR). FAIR is an ad hoc coalition of trade associations in the fishing industry that have joined together to seek a more equitable compensation system for injured fishermen. Seventeen commercial fishing associations and additional interested groups and individuals support our testimony.

FAIR appreciates the opportunity to testify today on vessel safety in the fishing industry and the need for a compensation program for injured fishermen. Vessel insurance is still an extremely critical issue for fishing vessel owners across the United States. The cost of insurance continues to increase either through higher premiums, larger deductibles, or lower coverage in our policies.

The members of FAIR are grateful for the effort made last year to pursue legislation on vessel insurance and safety under S. 2546. A key provision in that bill was an overall cap on the liability of vessel owners for permanent injuries. Even though this cap on liability has been dropped, we still support S. 849 as the best vehicle to address the need for a fair compensation for injured fishermen.

S. 849 establishes a system for temporary injuries that would compensate injured fishermen in a timely fashion. This, we think, would also lead to lower insurance costs to the vessel owner. At the same time, S. 849 establishes federal safety requirements for U.S. fishing vessels. We support these safety measures which most good fishing vessels already have adopted.

The members of FAIR strongly support the comprehensive approach taken by S. 849 and urge the Committee to approve this bill. We recommend, however, that a few amendments be made to strengthen and clarify its provisions. These include: resolving disputes over whether injuries are temporary or permanent; avoiding abuse of the compensation system; limiting the time for filing lawsuits; providing timely notice of injuries to vessel owners, establishing effective dates for safety requirements, and developing standards for ordering vessels to return to port.

## DEFINING TEMPORARY INJURIES

The compensation program in S. 849 is designed to bring an end to expensive and protracted lawsuits for "temporary" injuries. Because this program distinguishes between temporary and permanent injuries, these two types of injuries should be as clearly defined as possible.

Any uncertainty over whether a particular injury is temporary or permanent creates a burden for injured fishermen, vessel owners and insurance companies. Instead of reducing the legal expense now required for an injured fishermen to be compensated, the cost of litigation may actually increase if disputes over the nature of an injury are left soley for the courts to resolve.

Whether an injury is permanent or temporary is a question, primarily, for medical evaluation and should be determined by expert members of the medical profession as a precondition to litigation. Only those claimants with injuries that have been identified medically as permanent should be allowed to sue for damages for permanent injuries.

In order to address these concerns, we recommend that a provision be added to S. 849 stating that a civil action may not be brought unless: (1) the injury, illness, or disability has been examined by three licensed physicians, and (2) two of these physicians concur that the injury, illness, or disability is permanent. Attached is suggested language for an amendment. The amendment also provides for the selection and compensation for these licensed physicians.

## MAINTENANCE PAYMENTS

Our second suggestion concerns the formula in the bill for calculating maintenance payments. The bill expands the traditional concept of maintenance to include lost wages. The formula establishes the payment of maintenance during the period of illness, disability or injury in an amount equal to the greater of 80 percent of the wage or share the seaman would have received for each day of the voyage, or $30 a day.

Keeping in mind that these awards are tax-free, a maintenance payment of 80 percent of lost wages could provide an injured fisherman with income equal to, or in excess of, the amount he would have made when working. This could encourage claims of prolonged disability and abuse. We are concerned that under these circumstances, there would be no incentive for fishermen to return to work, especially if it would cut his net income. We recommend, therefore, that this part of the maintenance formula be set at 66⅔ percent of lost wages.

Fishermen who become disabled as a result of an on-the-job injury should be provided with a fair and adequate level of compensation during the period of their disability. A maintenance level of 66⅔ percent of wage will provide an injured fisherman with almost the equivalent of his after tax working wage. This is consistent Federal standards under the Longshoremen and Harbor Workers' Act and state workmen's compensation programs that have settled on 66⅔ percent as a fair level of compensation.

At present, the courts determine the level of maintenance. Thus, maintenance rates can vary depending upon the area of the country. We support the level of $30 per day established in S. 849. The rate of $30 per day represents a balance between the different maintenance rates across the country. Establishing maintenance levels at 66⅔ percent or $30 per day would provide fair and timely compensation and eliminate the court and attorney fees involved in establishing the level of maintenance on a case by case basis.

Under the bill, a vessel owner must pay maintenance, or forego the protection against lawsuits for temporary injuries. If the injury is found to be permanent, there is the possibility for double recovery of lost wages to the extent that lost wages are included in the maintenance payments. We recommend that those lost wages paid as part of maintenance be offset against any final award given for a permanent injury.

## STATUTE OF LIMITATIONS

The bill would reduce the current three-year statute of limitations to two years. We think that a one-year statute of limitations would be preferable.

There does not appear to be a compelling reason why a claim cannot be filed within one year from the date of an injury, illness, or disability. The cost to insurance carriers of maintaining a "tail" in their coverage for more than one year is substantial. A one-year statute of limitations, which is parallel to the Longshoremen and Harbor Workers' Act, would allow insurance carriers to predict losses with greater accuracy, eliminate capital requirements for potential claims in the second or third year after an injury and thus reduce premium costs. It would also prevent claimants from collecting maintenance on questionable claims for prolonged periods while they delay filing a court action until the statutory deadlines.

### NOTICE OF INJURY

Another change which would strengthen S. 849 concerns the need for notice of injury. Too often, vessel owners learn of an injury only when a lawsuit is filed. This can be years after the injury occurred. In the event of an injury, it is important to know the facts immediately and help the injured fisherman. With the passage of time it always becomes more difficult to recall specific events.

The model legislation for workmen's compensation programs recommended by the Council of State Governments provides that notice of injury or death must be given within 30 days. Federal compensation programs also include a 30-day notice requirement. We recommend that a provision requiring 30-day notice of injury be included in S. 849 similar to the one contained in the Longshoremen and Harbor Workers' Act.

### VESSEL SAFETY

FAIR supports the general safety provisions in S. 849. There are concerns regarding the dates of application of the provisions in Sections 4502(c), 4502(d)(1), and 4503. These provisions should come into effect a certain amount of time after the regulations come into effect. This would assure that vessels under construction now would not be forced to absorb the additional costs of retro-fitting. We suggest that these provisions come into effect eighteen months after the effective date of the regulatory provisions.

One additional concern relates to the authority S. 849 provides to enforcement officers under Section 4505 to order vessels to port if he is of the opinion that a hazardous condition exists. Objective standards need to be set out describing the situations under which an enforcement officer may exercise this authority.

That concludes my formal remarks on behalf of the fishing associations of FAIR listed below. Attached are amendments for your consideration. We look forward to working with the Committee on these as well as other amendments to address the issues in our testimony. Thank you, again, for the opportunity to testify.

### AMENDMENTS

SEC. 101. COMPENSATION FOR TEMPORARY PERSONAL INJURY.—(a) * * *

(b) A civil action (including an action for contribution or indemnification) may not be brought under any law of the United States against the employer of a seaman, a vessel owner, or a vessel for loss suffered as the result of a temporary illness, disability, or injury suffered by a seaman during the course of the seaman's employment to a fishing, fish processing, or fish tender vessel if the employer or vessel owner makes payment for, or otherwise provides—

(1) cure for the ill, disabled, or injured seaman; and

(2) maintenance during the period of illness, disability or injury in an amount equal to $30 a day.

* * * * * * *

(e) Except as provided in subsection (d), a civil action (including an action for contribution or indemnification) may not be brought under any law of the United States against the employer of a seaman, a vessel owner, or a vessel for loss suffered as the result of an illness, disability or injury suffered by a seaman during the course of the seaman's employment to a fishing, fish processing or fish tender vessel unless such illness, disability, or injury has been examined by three licensed physicians and two of whom concur that such illness, disability, or injury is permanent. The three physicians shall be selected as follows: one by the seaman; one by the employer or vessel owner; and one by the two physicians selected by the seaman and the employer or vessel owner. The cost of each examination shall be borne by the selecting person, except that the cost of the examination by the third physician shall be shared equally by the seaman and the employer or vessel owner.

### NOTICE PROVISION

Add to Sec. 101, at the end of the amended "SEC. 21"

(f)(1) Notice of any illness, disability, injury or death suffered by a seaman during the course of such seaman's employment to a fishing, fish processing, or fish tender vessel shall be given to the employer or vessel owner within thirty (30) days after the seaman or beneficiary is aware, or in the exercise of reasonable diligence should have been aware, of a relationship between the illness, disability, injury or death and the employment.

(2) Such notice shall be in writing, shall contain the name and address of the seaman and a statement of the time, place, nature, and cause of the illness, disability, injury or death, and shall be signed by the seaman or by some person on his behalf, or in case of death, by any person claiming to be entitled to compensation for such death or by a person on his behalf.

(3) Notice shall be given to the employer or vessel owner by delivering it or by sending it by mail addressed at the last known place of business of the employer or vessel owner. If the employer or vessel owner is a partnership, such notice may be given to any partner, or if a corporation, such notice may be given to any agent or officer thereof upon whom legal process may be served or who is in charge of the business in the place where the injury occurred.

(4) Failure to give such notice shall not bar any claim under this Act (A) if the employer or vessel owner (or his agent in charge of the business in the place where the injury occurred) had knowledge of the injury or death and that the employer or vessel owner has not been prejudiced by failure to give such notice, or (B) if for some satisfactory reason such notice could not be given.

SEC. 102. STATUTE OF LIMITATIONS.—The first section of the Act entitled "An Act to provide a uniform three-year statute of limitations in actions to recover damages for personal injury or death, arising out of a maritime tort, and for other purposes" (46 App. U.S.C. 763a) is amended by striking "That," and inserting "That (a)" and by adding at the end the following:

"(b) A civil action against the employer of a seaman or the owner of a fishing, fish processing, or fish tender vessel for recovery of damages for illness, injury, disability, or death suffered during the course of the seaman's employment to a fishing, fish processing, or fish tender vessel may not be maintained unless started within one year from the date the cause of action accrued.".

Senator **KERRY**. If Mr. Nall and Mrs. Barry could come forward please.

Mrs. Barry, thank you for being with us. We know you have been working on this for quite some time.

And Mr. Nall, we thank you for being with us. If you could help us along with a summary of your testimony, we will put the full statement in the record. And we would appreciate that.

Mrs. Barry, do you want to lead off?

## STATEMENT OF PEGGY BARRY

Mrs. **BARRY**. I have submitted our testimony, and this is a brief version.

I would like to thank you for the opportunity to testify today. I am here because I hope to convince you that the Congress must do something now to make commercial fishing vessels safer, whether or not something can also be done about improving the insurance situation for those at sea.

My husband and I became personally and painfully acquainted with the terrible safety record of the U.S. commercial fishing fleet in August of 1985.

Our son, Peter, between his sophomore and junior years at college, had sought a summer job in the beautiful and exciting State of Alaska.

He had ended up, more by chance than design, on a purse-seiner, fishing for salmon.

Three weeks later his body was picked up by another fishing boat, the first indication that the *Western Sea*, the 70-year-old wooden vessel he had been on, had sunk with its crew of six.

Only a few scraps of the boat were ever recovered, but we've learned the condition the *Western Sea* was in. She had rotten planking and loose hatch covers.

She was unstable due to an added superstructure and heavy skiff lashed above decks.

She had no bilge alarm, and only a hand operated bilge pump.

She carried no emergency radio beacon, or EPIRB; no life raft; and no survival suits, which are required to stay alive more than a few minutes in those icy waters.

And from the Coast Guard report of the investigation, we found that the skipper's body was found to contain cocaine.

Can you believe that no laws were broken? It's true.

We are convinced that Peter was less a victim of the sea than of gross negligence in the Nation's most dangerous and least regulated industry.

Safety in commercial fishing has not been a major public issue, because victims die in handfuls, not hundreds. But believe me, the numbers have mounted.

I have letters from people who have spent a decade trying to direct attention to this neglected area, and I'd like to cite some evidence that it is now recognized as a national problem, and in part, gentlemen, your problem.

I quote: The most dangerous industry in the United States by far is commercial fishing. The accident rate for fishermen is seven times the national average.

This reflects not only the dangers of the sea, but also, a less than adequate concern on the part of some fishing boat owners, and a general indifference of Congress to the need for laws to correct the situation.

That's a *Journal of Commerce* editorial, May 1986.

I quote again: It is difficult to understand why Congress has allowed the dangerous situation in the commercial fishing industry to continue. If men were being killed at this rate in any other line of work there would be a public outcry and a demand for action.

The shocking figures should produce a similar response.

*Washington Post* editorial, March 28th, 1987.

I'd like to submit the full text of the editorials I've quoted from, as well as the Coast Guard report of the sinking of the *Western Sea,* and a more recent report of a very similar sinking in Alaska in which five out of the six crew members were saved only because they had survival suits; no other difference.

The fact that we are here today proves that Congress is listening to these voices. We support S. 849, the Chafee bill, and are particularly grateful to Senator Chafee, who was the first to respond to our calls for help.

He has consistently argued that the safety issue should be dealt with in conjunction with the insurance problem, in which high premiums have led to an estimated 30 percent of all documented commercial fishing vessels having no insurance, including, incidentally, the *Western Sea.*

We would also like to thank Senator Kerry, who is a cosponsor, and Senator Adams, who with others in the Washington delegation, has been very supportive of the fishing industry.

We also thank Senator Trible for his early support of mandatory EPIRBs.

S. 849 would represent a quantum improvement over existing safety law, but recent developments suggest some areas in which it could be further strengthened.

New profitability is bringing with it new hazards. At one end of the scale, large modern vessels are today owned by big businesses which see themselves as investors, a great distance from the responsibility of the operation of the vessels.

This is particularly true of fish processing vessels. We have heard from operators who, for the sake of their livelihood prefer to remain anonymous, who have been ordered to sea on vessels they knew to be unsafe in order to chase a lucrative catch of fish.

The NTSB states that these vessels, and I quote, appear to be in need of safety regulation like that provided by OSHA . . . it should be the responsibility of the government to recognize these shortcomings in industry and take corrective measures, unquote.

S. 849 should be strengthened in respect to these vessels, and a study of the special safety problems undertaken by the NTSB and OHSA.

We also believe that operator licensing, crew training and inspection of all documented fishing vessels, particularly the elderly ones, should be considered, as I believe we will hear that the NTSB also recommends.

At the smaller end of the scale, marginal vessels are setting off with inexperienced crews and/or skippers. Disaster statistics from the Northwest are becoming studded with cases of flat-bottomed boats from the Gulf of Mexico, which follow the money up the West Coast; are destabilized by the addition of heavy equipment; and are thrown into a fishery for which they were never designed.

A regular stability inspection should be required for all vessels converted for new fisheries.

We appreciate the Coast Guard's support of this sort of inspection.

A recent court decision in Portland, Oregon should be carefully looked into as well. After a vessel sank out there with the loss of its crew of three, the Judge ruled that it is an owner's, and I quote, absolute and undelegable duty, unquote, to provide adequate lifesaving equipment, in this case, a life raft and a survival suit for each member of the crew.

The Judge also ruled the owner negligent for having no stability test after a conversion. He was not providing a safe workplace, which is all we're asking for.

I will refer here to only one more specific provision of S. 849, and that concerns the commercial fishing vessel advisory committee.

If its purpose is, and I quote from the bill, to advise and make recommendations on matters relating to the safe operation of fishing vessels, I think it should have the word "safety" in the title.

It would also seem reasonable that at least one of its suggested 17 members would be a safety advocate first and foremost.

As the bill reads now, there would be 10 members from the fishing industry; maybe I'm a version behind, but we all know that those would be fishing vessel owners, many of whom are splendid people, but I fear their instinct to put profit before safety.

As Senator Chafee noted, very few of those would be crew members. And I think it should be mandatory that representatives of the crew be there.

In conclusion, gentlemen, I'd like to thank you for your attention and your patience. This is a complicated issue, and I don't pretend to make it otherwise.

I'm not an expert, nor are most of the people we speak for. They're just mothers and fathers, family members or friends, who don't know what to do or where to go.

Losing a son is not a complicated thing. It's far too simple, and it changes one's values forever. Everytime I read or hear of another death at sea which could have been prevented, my pain is harder to bear.

As you deal with the conflicting interests represented in this bill, please, keep those precious lives in mind.

Thank you.

[The statement follows:]

# TESTIMONY OF MRS ROBERT L. BARRY
## NATIONAL OCEAN POLICY STUDY AND COMMITTEE ON COMMERCE, SCIENCE AND TRANSPORTATION, U. S. SENATE,
## SEPT 16. 1987

Thank you for the opportunity to testify today. I am here because I hope to convince you that the Congress must do something NOW to make commercial fishing vessels safer, whether or not something can also be done about compensation for temporarily injured seamen.

My story is simple. My husband and I took up the cause of fishing vessel safety when our son, Peter, died with the rest of the crew in the sudden sinking of the Western Sea, a 70 year old wooden trawler, off Kodiak, Alaska in August of 1985. The Western Sea was unstable and unseaworthy, and carried no life rafts, no survival suits, no emergency position indicator beacons, no bilge alarms, no power driven bilge pumps or other equipment necessary to deal with an emergency at sea in Alaskan waters. The owner carried no insurance, and according to the autopsy he had been using cocaine. We could not believe that he had violated no laws or regulations in so endangering his crew. We are now convinced Peter was less a victim of the sea than of gross negligence in the nation's most dangerous, and least regulated industry.

Since then we have been in touch with hundreds who share our concerns. Some have lost children or husbands or close friends at sea. Some are experienced fishermen themselves, both owners and crewmen. Some are marine architects, investigators, experts in fishing vessel safety from the Coast Guard and other government agencies. Some are lawyers who have represented injured seamen or relatives of those who have died. Some are consumer advocates, union officials, organizations which defend seamen's rights. Some are members of Congress. What unites us is a common conviction that lives can be saved by doing something promptly to require better safety equipment and practices in the fishing industry.

Safety in commercial fishing has not been a major public issue because victims die in handfuls, not hundreds. Most disasters or near disasters barely make the local media. But there is a growing sense that the problem must be dealt with. Let me cite some evidence:

"The most dangerous industry in the United States, by far, is commercial fishing. The accidental death rate for fishermen is seven times the national average. This reflects not only the dangers of the sea, but also a less than adequate concern on the part of some fishing boat owners and a general indifference in Congress to the need for laws to correct the situation." (Editorial, Journal of Commerce, May 7, 1986. )

"Why do fishermen take such huge risks? That is a question that 20 minutes on national television couldn't really answer although several seine skippers out of Kodiak took a stab at it. They talked a lot about personal freedom and independence, but what they didn't talk about was responsibility - to their crewmen. (Editorial letter, Alaska Fisherman's Journal, September, 1986)

"With millions of American workers protected by health and safety regulations that are vigorously enforced, it is difficult to understand why Congress has allowed the dangerous situation in the commercial fishing industry to continue. If men were being killed at this rate in any other line of work, there would be a public outcry and a demand for action. The shocking figures in the fishing industry should produce a similar response." (Editorial, Washington Post, March 28, 1987)

"In conclusion, it should be the responsibility of the government to recognize those shortcomings in industry and take corrective measures and, in effect, say to those of us who formulate plans and who put profit before safety, "Your values are in error and we are going to insist that you straighten them out". (Letter to the National Transportation Safety Board from President, United Shell Fishermen's Association, July 13. 1987, cited in NTSB report NTSB/SS/ 87/02).

"Hiring crewmen aboard a fundamentally unsafe vessel should no longer be legitimate business. There ought to be a law against it". (Editorial, Alaska Fisherman's Journal, May, 1986).

"I find as a matter of law that the lack of a suitable life raft and survival suits for each crew member rendered this vessel unseaworthy." (Opinion of Judge Leavy, US District Court for Oregon, May 12, 1987 Civil No. 86-490 LE)

We know the Congress is listening to these voices. We support S-849, the Chafee bill, and are particularly grateful to Senator Chafee who introduced a similar bill in the last Congress. He was the first to respond to our calls for help, and has consistently argued for dealing with the safety issue while at the same time helping the fishermen to do something to control escalating insurance rates. We agree that in fairness to the fishing boat owners, the two problems should be dealt with together if possible. We are also grateful to the chairman of this panel, Senator Kerry, is a co-sponsor of S-849 and to Senator Adams, who with others in the Washington delegation has been an influential advocate of fishing safety.

S-849 would represent a substantial improvement over existing law dealing with safety, but we think that it can be improved upon. We ask you to reflect upon new developments in the past year which suggest the need for new approaches.

-- First we believe that new profitability is bringing new hazards. Commercial fishing these days is no longer a subsistence business with family-owned boats and crews who learn the business from childhood. Modern vessels today are increasingly owned by big businesses which see themselves as investors, not operators, and stay as distant from the operations as possible. At the other end of the scale marginal vessels are being operated by inexperienced skippers and crews gambling their stake on a big catch. The National Transportation Safety Board estimates that only a minority of our 33,000 documented fishing vessels belong to industry organizations which enforce safety regulations of their own, and that some 30% of the fleet, like the Western Sea, carry no insurance at all. With the prospect of bigger profits, we increasingly see vessels built for one kind of fishery converted to another, with little concern for stability and watertight integrity. The NTSB reports that some 200 vessels are now being built on the Gulf Coast, many with no watertight bulkheads; these vessels will end up in waters for which they are totally unsuited carrying gear for which they were never built.

--In our view, fish processing vessels deserve special study and attention. They are often the least seaworthy vessels with the largest and least experienced crews. We have heard from crew memebrs and officers of these vessels who fear to testify publicly because they are sure they will be "blackballed" by the industry. They have described appalling safety conditions on ancient and unseaworthy processors which have narrowly escaped disaster. On March 20 of this year the processor "All Alaska" went aground and broke up near Kodiak, and by a miracle its crew of 124 was saved. The NTSB says that fish processing vessels "appear to be in need of safety regulation like that provided by OSHA". We think that S 849 needs to be strengthened in this regard, and that a special study of safety problems in processors and tenders should be undertaken by the NTSB and OSHA.

--Also new is the position of the Coast Guard on mandatory safety regulations. Until this year, they argued that a voluntary safety program would do the job. While still favoring "voluntarism", the Coast Guard testified before the House on June 11 that they support the mandatory safety requirements of HR 1841, which are also those of S 849. We welcome this significant change.

--Recent court decisions also should have a bearing on this bill. The US District Court in Portland, Oregon, ruled on May 8, 1987, that it is an owner's "absolute and undelegable duty" to provide adequate lifesaving equipment - in this case a life raft, and a survival suit for each member of the crew. The judge also ruled the owner negligent because he had no stability test performed after the vessel's conversion. This confirmed a prediction made at a Washington conference on fishing vessel safety and insurance last February, to the effect that the courts would soon transform the Coast Guard's "voluntary" recommendations to a common law requirement.

--A related development is the introduction of fishing safety legislation in some state legislatures, sometimes with the support of local fishermen. Such a bill (S 829 ) has been introduced in California, and if no new Federal laws are passed the states may fill the vacuum. The combined result of common law and state laws will create a patchwork which may work greater hardships on the industry than a single set of minimal federal guidelines which will let everyone know where they stand wherever they fish.

--Another new element in the equation is the National Transportation Safety Board's 1987 study just completed, which will be described here today. This is the first comprehensive study of fishing vessel safety published by a government agency, and we endorse its recommendations fully. The NTSB enjoys the confidence of the public and the Congress when it deals with the airlines, the railways or the trucking industry. It deserves no less credibility for its year long study of commercial fishing.

These new factors lead us to recommend new provisions which the Senate might consider adding to S 849;

1. A requirement that all operators be licensed, so that those who hold the crews' lives in their hands are experienced and prudent. So that licensing would not be unduly burdensome on the industry or the Coast Guard, we suggest that existing operators be "grandfathered", as was the case when towboat operators were required to be licensed in the late 1970's.

2. A requirement that all crew members be required to pass a safety

and survival training course, as many other nations require. (The British Parliament passed such a requirement last year, for all crew members under 50). As the NTSB suggests, the first step towards this goal might be to establish minimum safety training standards and require owners/operators to provide safety training to crew members.

3. A requirement that all uninspected commercial fishing vessels, including tenders and processors, be certified and periodically inspected by the Coast Guard or a recognized representative to be sure that Federal safety standards are met. We suggest a special study of safety on processors and tender vessels.

4. That an absolute prohibition be enacted and enforced on the use of alcohol or drugs when engaged in commercial fishing operations.

5. That the purpose and membership of the "Commercial Fishing Vessel Advisory Committee" provided for in the bill be modified to put more emphasis on safety. We believe safety ought to be in the title and the mandate of the commission, and that some of the members should be recognized safety advocates independent of the industry or any special interest group.

In conclusion, let me thank you for your attention. We are much encouraged by S 849 and the Congressional concerns that have sparked it.. But we do hope that as the two Houses of Congress consider this important legislation, the new developments we have cited will be carefully considered, and that you will agree that something needs to be done about the safety issue now, whether or not it is possible to form a consensus on compensation for the temporarily injured.

Senator KERRY. Well, thank you very much, Mrs. Barry. I know that it's not easy for you to testify, but we certainly appreciate enormously your continued activities and concern for others that grows out of your personal tragedy.

And we are just very grateful to you, and I think that you will help, and have helped, to provide tremendous impetus and keep people's focus where it ought to be, which is on real lives, and on our ability to try to do something that we ought to be doing.

So I thank you. It's very, very important to us, and very helpful.

Mr. Nall.

## STATEMENT OF JOSEPH T. NALL, MEMBER, NATIONAL TRANSPORTATION SAFETY BOARD; ACCOMPANIED BY LUIGI COLUCCIELLO, CHIEF, MARINE ACCIDENT DIVISION; AND BILL GOSSARD, TRANSPORTATION SAFETY PROGRAM SPECIALIST

Mr. NALL. Thank you, Senator. And we appreciate the opportunity of being able to testify today.

I have with me Mr. Lu Colucciello, who is the chief of our Marine Accident Division at the NTSB, as well as Bill Gossard, transportation safety program specialist, primarily responsible for the recent fishing vessel study.

We appreciate the opportunity to discuss S. 849.

As you know, the Safety Board investigates all major marine accidents that occur on navigable waters in the United States, major marine accidents that involve U.S. merchant vessels in international waters, and accidents involving U.S. public vessels and nonpublic vessels.

In addition to our typical accident investigation, we regularly conduct special studies of safety matters. And we have undertaken a study that addresses safety issues developed through our accident investigations.

Today I would like to provide you with recommendations arising out of our recent study based on 203 accidents from 1978 to mid-1987 regarding the safety needs for the uninspected commercial fishing vessel industry.

The Safety Board believes that the components to improve the safety level already exist in the Coast Guard's technical circular and the training courses referred to earlier today.

We have recommended, and what we believe, is first that the Coast Guard should establish training requirements for captains and crew members commensurate with their respective responsibilities.

Second, establish licensing requirements, at a minimum, for captains.

Third, expand the basic lifesaving equipment requirements.

Fourth, establish stability information and inspection requirements.

And fifth, vessel inspection to assure compliance with these particular safety goals and objectives.

First, I would like to discuss commercial fishermen training, and I am going to illustrate that with an accident that occurred August 7, 1985, relating to the U.S. uninspected fishing vessel the *Sea Dancer*, with four persons aboard, which sank in Bristol Bay, Alaska.

The seas were 16 to 20 feet high, the winds were 35 to 45 knots. The captain informed the Coast Guard and several nearby fishing vessels that the vessel was taking in water and needed assistance.

One fishing vessel, the *Peggy Sue*, reached the *Sea Dancer* and assisted in the rescue of the captain and two others. One person aboard the *Sea Dancer* was reluctant to enter the water, even though she was in an exposure suit.

She had not been trained in the proper use of such life saving equipment, and as the vessel sank, she remained aboard.

The captain testified he saw her appear and then quickly disappear; she was never seen again.

The Safety Board determined that contributing to the accident was the owner's failure to assure that the *Sea Dancer's* captain was adequately trained, to the crew and that such training was given, even minimal training, on the use of survival and emergency equipment.

I think where we are coming from is that training must be mandatory in the proper use of the survival equipment. Simply having equipment on board is a minimal step.

And I agree with the phrase, "a bandaid approach." Safety equipment is only a beginning, and that may save some lives. But simply to have it aboard is not sufficient.

There must be regular training, actual emergency training, in the use of this equipment.

The Safety Board has addressed the need for training captains and crew members in numerous accidents which I will not discuss at this point due to brevity.

We are aware of two developments that can make a significant improvement in commercial fishermen training. Those courses are the "Vessel Safety Manual" prepared jointly by the Coast Guard and the North Pacific Fishing Vessel Owners Association; and the Coast Guard's "Navigation and Inspection Circular," which provides technical information.

We know that the association's training courses cover fundamental safety concerns. And in essence we feel that the curriculum established in that safety manual is a good one, is a basic beginning, and it is fundamental.

If that course is taken by all captains, we feel that there will be significant improvements. But as you know, these course are voluntary, similarly to what we see in FAA training courses or FAA seminars that are voluntary.

Typically, the best people attend them, the people who may need the information the least. For example, during the two years of its use, about 420 captains and crew members have attended the courses in the Seattle area.

That is gratifying. But you will have to recall that there are about 16,500 active fishermen to train in Washington State alone.

We feel the voluntary program has not demonstrated, and would not demonstrate, sufficient use by the crew members to really get at the problem among all the various crews.

The Coast Guard, we recognize, has already developed a framework for mandatory national commercial fishing vessel training by approving the Vessel Safety Manual, and its accompanying training classes.

That effort, we feel, should now be accelerated to require training for all crew members.

Second, the licensing of captains. Most captains simply learn on the job; they learn and begin as deck hand mates, as operators under other captains who also have had little formal training.

Training and licensing of uninspected commercial vessels go hand in hand. We believe that the captain should be licensed and that mandatory training of course should be imposed.

Most importantly, the captain should demonstrate that he or she meets minimum qualifications, by passing a written examination or oral examination if appropriate, on such practical problems in vessel safety as navigation, seamanship, rules of the road, vessel stability, fire-fighting, watertight integrity and the use of lifesaving equipment.

The Safety Board believes that the Coast Guard is equipped to institute such a licensing program because it already has done so in another area, that is, the uninspected towing vessel area.

Third, regarding stability, we have concluded investigations of the Altair and the Americus sinkings, wherein we ruled that the probable cause of the capsizings was the vessels' inadequate intact stability caused by improper loading, and the addition of trawling gear.

There is a definite need for vessel stability tests for existing vessels as well as newly manufactured vessels.

And the other issue relates to a publication of stability information in a readable form and useable form by the captain of such uninspected commercial fishing vessels.

The life-saving equipment requirements we feel are self explanatory.

The sea, as we have already heard, is a harsh environment. Particularly, the exposure suits have a great potential of saving lives in the colder waters of the northern climes.

We would add the bilge and fire alarm equipment; they are not addressed in the proposed bill. We would also recommend operable emergency radios, in addition to any permanently installed radios that may be on the current vessels.

Certainly, at least one operable radio.

As a result of our study we recommended that the Coast Guard undertake a number of actions to minimize and reduce the tragedies at sea, involving uninspected commercial fishing vessels.

I will not read all of our recommendations. They are stated in our report, a copy of which has been furnished to you.

In conclusion, we believe that uninspected commercial fishing vessel safety can be effectively improved. We have seen improvements that result in other modes of transportation from mandatory training, from mandatory licensing, and from an active and aggressive surveillance by an appropriate government agency.

Senate 849 addresses a number of these areas of concerns, and we strongly support the Congressional efforts to provide at least this beginning minimum safety framework, but we would certainly encourage further and more aggressive provisons of the bill.

Thank you.

[The statement follows:]

### STATEMENT OF JOSEPH T. NALL, MEMBER, NATIONAL TRANSPORTATION SAFETY BOARD

Mr. Chairman, Members of the Committee, I appreciate this opportunity to appear before you today to discuss S. 849, a bill to establish guidelines for compensation for injuries by seamen on fishing industry vessels and requires safety regulation for such vessels. We are very pleased for your timely consideration of this important legislation.

The Safety Board investigates all major marine accidents that occur on navigable waters of the United States. In addition, it investigates major marine accidents that involve U.S. merchant vessels in international waters and accidents involving U.S. public vessels and non public vessels. Under joint regulations promulgated by the Board and the U.S. Coast Guard, the Coast Guard conducts the preliminary investigations of all marine accidents and notifies the Board if an accident is within its jurisdiction. The Safety Board then responds in one of three ways: by conducting its own investigation, by participating in a joint investigation with the Coast Guard, or by requesting that the Coast Guard conduct an investigation for the Safety Board.

In all cases the Safety Board completes its own independent analysis of the accident and determination of probable cause or causes. As a result of its investigations, the Board directs safety recommendations to agencies such as the U.S. Coast Guard, the National Oceanic and Atmospheric Administration, fishing vessel companies and other maritime organizations.

In addition, the Safety Board undertakes studies that address safety issues developed through our accident investigations. Today, I would like to provide you with the results of our study, based on 203 accidents from 1978 to mid-1987 of the safety needs for the uninspected commercial fishing vessel industry.

The term uninspected commercial fishing vessel as used by the Safety Board denotes a vessel not subject to U.S. Coast Guard materiel inspection, certification, and safety standards in such areas as hull, machinery, lifesaving and firefighting equipment, and navigational equipment. Additionally, the vessels generally are not required to have licensed personnel nor documented seamen and there are no manning requirements.

In 1986, there were approximately 100,000 commercial fishermen operating 33,000 U.S. uninspected commercial fishing vessels. These fishermen participated in landing 60 billion pounds of fish valued at $2.8 billion. They risk their lives daily in a harsh and hostile environment that demands safe operating practices, solid training in safety measures and, in the event of an accident, adequate safety equipment in good working order.

Today, there is no requirement that commercial fishermen who work on U.S. uninspected commercial fishing vessels complete the training necessary to perform their jobs safely. Further, federal requirements for safety equipment applicable to uninspected commercial fishing vessels are inadequate.

The Safety Board believes that the components to improve the safety level of these vessels already exist in the Coast Guard's technical circular and the training courses. What we believe is needed is for the Coast Guard to:

Establish training requirements for captains and crewmembers commensurate with their respective responsibilities.

Establish licensing requirements, at a minimum for captains.

Expand the basic lifesaving equipment requirements.

Establish stability information requirements.

## COMMERCIAL FISHERMEN TRAINING

On August 7, 1985, the U.S. uninspected fishing vessel *Sea Dancer,* with four persons onboard, sank in Bristol Bay, Alaska, approximately 55 nmi northwest of Cold Bay, Alaska. The seas were 16 to 20 feet high, and winds were 35 to 45 knots. The vessel began to take water from the high seas through a door and hatchways to the fishholds. The captain informed the Coast Guard and several nearby fishing vessels that the vessel was taking in water and needed assistance. One fishing vessel, the *Peggy Sue,* reached the *Sea Dancer* and assisted in the rescue of the captain and two others. One person aboard the *Sea Dancer* was reluctant to enter the water even though she was in an exposure suit. She had not been trained in the proper use of such lifesaving equipment and, as the vessel sank, she remained onboard. The captain testified that he saw her appear and then quickly disappear. She has never been seen again. The Safety Board determined that contributing to the accident was the owner's failure to ensure that the *Sea Dancer's* captain was adequately trained in vessel stability.

The Safety Board has addressed the need for training captains and crewmembers in a number of other catastrophic accident reports, including its reports on the sinking of the *Santo Rosario,* the loss of the *Amazing Grace,* the capsizing of the *Americus,* and the disappearance of the *Altair.* Other Safety Board reports, such as those on the sinking of the *Bonaventure,* the capsizing of the *Liberty,* and the sinking of the *Atlantic Mist,* highlighted the need for training in specific areas, such as watertight integrity.

The Safety Board has attempted to address the training issue in three ways: through the Coast Guard, through fishing vessel associations, and through individual fishing vessel companies.

Even though commercial fishing is a specialized and dangerous activity, with the potential for catastrophic consequences if tasks are performed incorrectly, there are no safety training requirements. Training is available from some proprietary fishing vessel organizations and some universities involved in fishing vessel safety.

The Safety Board is aware of two developments that could significantly improve commercial fishermen training: the training courses and "Vessel Safety Manual," prepare jointly by the Coast Guard and the North Pacific Fishing Vessel Owners' Association (NPFVOA), and the Coast Guard's Navigation and Inspection Circular 5-86, which provides technical information used in the Manual.

The NPFVOA's training courses cover fundamental safety concerns appropriate to uninspected commercial fishing vessel operations. However, these courses are voluntary. During two years, about 420 captains and crewmembers have attended the courses in the Seattle area. This is gratifying, but there are approximately 16,500 active fishermen to train in Washington State alone. Mandating training for captains and crewmembers would accelerate attendance at such courses and would no doubt spark development of new private/public training centers.

The Coast Guard already has developed the framework for a mandatory national commercial fishing vessel training program by approving the "Vessel Safety Manual" and its accompanying training classes. The effort should now be accelerated to require training for all commercial fishermen and to develop training centers like NPFVOA's, which meets Coast Guard training criteria. To accomplish this effort, the Coast Guard should establish minimum safety training requirements.

### LICENSING

About 0430, on July 23, 1984, the 70.5-foot-long U.S. fishing vessel *Santo Rosario,* while fishing about 35 nmi east of New Smyrna Beach, Florida, capsized and sank. Three crewmembers were rescued by a fishing vessel nearby, but the fourth, sleeping below deck went down with the vessel and drowned.

About November 14, 1984, the 86-foot-long, uninspected U.S. fishing vessel *Amazing Grace* sank about 80 nmi east of Cape Henlopen, Delaware; there probably were seven crewmembers aboard. The *Amazing Grace* has never been located, and the crewmembers are missing and presumed dead. A 16-day search by the Coast Guard turned up only one of the two liferafts from the vessel.

Both the crew of the *Amazing Grace* and the *Santo Rosario* were typical of most fishing vessels. The captains had no formal training in vessel safety. Like most captains, they had served as deckhand mates and as operators under other captains who also had very little formal training in stability, firefighting, or use of lifesaving equipment.

Currently, there is very little if any incentive for a captain to seek training. The only measure of a captain's worth is his or ability to locate and catch fish. There is no incentive to take time off and work to attend training courses, seminars, or expositions that address safety.

Training and licensing of uninspected commercial fishing vessel captains go hand-in-hand. There should be a federal requirement that a captain of an uninspected commercial fishing vessel have a license and that the license can be issued only after meeting minimum safety qualifications. Most importantly, the captain should demonstrate that he or she meets these minimum qualifications by passing a written examination or oral examination on practical problems in vessel safety, including navigation/seamanship, rules of the road, vessel stability, firefighting, watertight integrity, and the use of lifesaving equipment. In addition, the captain should demonstrate eligibility for the license through time in service to show proficiency in the skills required for commercial fishing operations.

The Safety Board believes that the Coast Guard is equipped to institute such a licensing program and has already undertaken such programs for other marine operations—for example, the licensing of operators of uninspected towing vessels. Such a licensing program would raise the safety level in commercial fishing vessel operations in several ways. First, the captain would be better prepared to handle an unexpected life-threatening emergency; second, the captain could disseminate valuable emergency instructions and provide drills on the safety features of the vessel for his crew prior to departure; third, the captain could impart navigation and seamanship skills to the crew; and finally, the training required for such a license could cause a greater appreciation of the need for the readiness of safety equipment and the periodic maintenance of that equipment.

### STABILITY REQUIREMENTS

Two tragic casualties focused attention on the problem of fishing vessel stability. About 0230 on February 14, 1983 the fishing vessel *Altair* departed Dutch Harbor, Alaska for the crab fishing grounds near Pribilof Island in the Bering Sea. About 0330, the helmsman of another fishing vessel en route to Dutch Harbor saw the *Altair* proceeding on a course toward the Pribilof Island at about knots. About 0830, the fishing vessel *Americus,* a sistership to the *Altair,* departed Dutch Harbor for the same crab fishing grounds. Both the *Americus* and the *Altair* on departure were fully loaded with crab pots. About 1430 the capsized hull of the *Americus* was sighted about 30 nmi north of Dutch Harbor. The *Altair* was never seen again. The

*Americus'* seven crewmembers and the *Altair's* seven crewmembers are missing and presumed dead. The value of the two vessels was estimated at $6.2 million.

The Safety Board concluded that the probable cause of the capsizings was the vessels' inadequate intact stability caused by improper loading and the addition of trawling gear. Contributing to the accidents were the owners' failure to determine the stability characteristics of the vessels and to amend the vessels' stability information after trawling gear was installed, and the captains' failure to comply with the provisions of the existing stability information.

There is a definite need for vessel stability tests and understandable stability information to be uniformly provided to captains of uninspected commercial fishing vessels. The Coast Guard recognizes this need in its voluntary navigation circular NVIC 5-86, which devotes considerable attention to stability. However, NVIC 5-86 provides only voluntary guidance and, therefore, cannot effectively address the stability issue.

In order to address stability in any meaningful fashion, stability testing for all newly constructed uninspected commercial fishing vessels must be required. Additionally, any time a fishing vessel undergoes major structural alterations that shift the vessel's center of gravity, further stability tests should be required. In addition, stability characteristics and guidance on proper loading of an uninspected commercial fishing vessel must be provided to captains in a form they understand, and stability information must be kept on the vessel where the captain can easily find it.

### LIFESAVING EQUIPMENT REQUIREMENTS

In many casualties, the absence of lifesaving equipment drastically reduced the chances that the captain and the crewmembers could survive in the harsh sea environment. The Safety Board believes that lifesaving equipment necessary to effectively meet most unexpected occurrences at sea—fires, capsizings, and founderings—should be required on all uninspected commercial fishing vessels. This includes exposure suits (in applicable waters), bilge and fire alarms, inflatable liferafts, an operable emergency radio, and emergency position indicating radio beacons. (The Congress has taken action on the need for EPIRBs and the Coast Guard's rulemaking was published in the Federal Register on September 3, 1987.)

As a result of our study we recommended that the Coast Guard undretake a number of actions to minimize and reduce the tragedies at sea involving uninspected commercial fishing vessels. A number of these safety recommendations require Congressional action. Most notably we recommended that the Coast Guard:

Seek legislative authority to require the licensing of captains.

Seek legislative authority to require stability tests be conducted and that complete stability information be provided to captains.

Establish minimum safety training standards.

Seek legislative authority to require basic lifesaving equipment including but not limited to:

Exposure suits in applicable waters.

Flooding detection alarms and automatic dewatering systems.

Fire detecting alarms and fixed firefighting systems for enginerooms.

Liferafts to accommodate all persons onboard.

Emergency radios with an independent power source.

Establish standards for the implementation and use of the new 406 MHz emergency position indicating radiobeacon.

Seek legislative authority to require that all uninspected commercial fishing vessels be certified and periodically inspected by the Coast Guard or its recognized representative to ensure that the vessels meet all applicable Federal safety standards.

Include in the final rule on "Operation of a Vessel While Intoxicated" an absolute prohibition against the use of alcohol and/or drugs while engaged in commercial fishing operations.

In conclusion, the Safety Board believes that uninspected commercial fishing vessel safety can be effectively improved by these recommended actions. S. 849 addresses a number of these areas of concern in Section 4502 on safety standards. However, the Safety Board believes that the proposed legislation could be further improved by removing the date December 31, 1987 from Section 4502(c). The Safety Board believes that regulations to be prescribed by the Coast Guard should be made applicable to all uninspected fish processing vessels.

The Safety Board strongly supports Congressional efforts to provde a minimum safety framework to improve uninspected commercial fishing vessel safety.

Mr. Chairman, that completes my formal statement. I would be pleased to answer any questions you and the other Committee Members may have.

Senator **Kerry**. Well, thank you very much. I appreciate that. I think that was very comprehensive, not leaving an enormous number of questions.

My primary question is, what about the resource issue? To do all those mandatory programs that you've recommended, is the Coast Guard going to have to select some first priority because of resources, and if so, what should it be?

Mr. **Nall**. It is apparent that the Coast Guard, given its current resources, would be hard pressed to introduce such licensing and inspection programs now.

I think there will have to be a greater commitment to more resources at the Coast Guard.

Senator **Kerry**. With what they have now, could you tell us what we can proceed forward on? I don't think we can pass this with assumptions about immediate resources; maybe we can. It's something we're going to have to look at.

But are there some first priorities that they could implement?

Mr. **Nall**. I think if you are asking us to prioritize, I would certainly say that the basic life-saving equipment portions of the bill, that is first and foremost.

I really cannot prioritize, though, because the Coast Guard involvement in licensing and inspection go hand in hand with the lifesaving equipment.

You cannot simply say, use the equipment, provide training. There must be some way of effective oversight and enforcement of compliance with those requirements and regulations.

We feel that training is the second priority.

Senator **Kerry**. What's the compliance training? How do you show that somebody's been trained in a suit or in the use of the life-saving equipment, rafts or otherwise?

Mr. **Nall**. Well, we regularly see that many of the crews—in fact, one occurred just this week off of Rhode Island—were in exposure suits, and did have an inflatable raft.

They survived and were picked up.

We see a very high incidence of survivability where there is good equipment, and where they are trained.

Senator **Kerry**. I understand that. I don't question that for one instant, and I'd like to see it happen.

I'm just saying—how do you create the accountability? How do you know somebody has been trained?

Where is the oversight?

Mr. **Nall**. That again, I think, goes to the third issue, which is licensing. There must be a licensing process for you to know who the captains are.

And with that licensing at least of captains, we do see sufficient oversight.

Senator **Kerry**. Senator Chafee.

Senator **Chafee**. Thank you, Mr. Chairman.

First of all, I want to thank Mrs. Barry so much for appearing here today and continuing her efforts. What she is doing is trying to see that in the future lives are not lost, and that the tragedy that occurred in her family is not repeated in other families.

So Mrs. Barry, we're very grateful to you for being here, and also want to express our appreciation to Ambassador Barry for the wonderful support he's given you in all this effort.

Mrs. **Barry**. Thank you.

Senator **Chafee**. It seems to me, Mr. Nall, that we're dealing with expensive vessels here. And to have a requirement that the skipper go through some course of *X* days—I don't know how much—is not an undue burden, an undue burden either on the Coast Guard or on the individual.

And indeed, Mrs. Barry in her testimony, and no one has got a deeper interest than her in this, suggests that the existing operators be grandfathered, as was the case when towboat operators were required to be licensed in the late 1970s.

It's been our experience, at least mine in the Senate, and I suspect our chairman will echo this, that there is always resistance to any new requirement. We can't do it. We can't do it.

And it seems to me the first step--I'm going to investigate this further when, as I mentioned to the chairman earlier, I hope we can have some hearings right in the fishing areas. In my case, it would be in Galilee, Rhode Island, to get the response of the skippers there.

But in these major fishing areas, I would think there could be courses set up. Now, I understand the difficulties as pointed out by the Senator from Alaska.

But these problems are not unsolvable, if we are dealing with the skippers.

But there are relatively—I do not want to say relatively few skippers, but the skippers as a representative of the group are just a percentage of them. And I would hope that we could get that training that you indicated.

How long do you think such training would take? Do you have any idea? Would it be three days, something like that?

Mr. **Nall**. We have seen in the North Pacific Fishing Vessel Owners Association safety course, their Vessel Safety Manual. Mr. Gossard tells me it is a one-week program, five-day program.

So it is not that extensive in terms of a time commitment.

Senator **Chafee**. And then as far as the tragic example you pointed out of the young woman who apparently wasn't familiar with her wet suit and did not dare plunge in, they could train their crew fairly rapidly I should think in at least these basics, to use a survival suit.

Well, I know that the problems with the Coast Guard, we are giving them the duties to enforce the drug act to a far greater degree than we have; we are constantly imposing new obligations on them in connection with policing the fishing grounds.

But I do not think that this is so difficult. I would be interested to hear the testimony of the skippers or the owner-operators on this, particularly when you take—what do you think about Mrs. Barry's proposal on the grandfathering?

Mr. **Nall**. I heard the testimony as well of Captain Piche today. And in terms of grandfathering, we would like to see every captain, regardless of his prior history, regardless of his experience, we would like to see mandatory training for everyone who operates a vessel as an uninspected commercial fishing vessel.

I think that realistically there may have to be a phase-in period. But we propose it for all such vessels existing, and for new captains who may be licensed in the future.

Senator **KERRY**. You say you propose it, but let us be realistic here. We are trying to get something together.

Are you really going to take somebody who's got 25 years' experience at sea, who's captained some large vessels with a record of accidents, and put them through some kind of training course?

You think you are going to get that together?

Mr. **NALL**. Senator, we have seen instances where seasoned captains lacked some basic navigational skills. And I would echo, there are areas where charts are not regularly used; where weather reports are not regularly sought.

Some of the fishermen have grown up simply in an area where to be daring, to be casual about it, to have that kind of adventurous mind set, seems to be accepted in the industry.

I think you do have captains, regardless of their experience, who need to be schooled in the rules of the road, in the operation of newer equipment.

The safety equipment, for example, has changed considerably. We have EPIRB technology now, the survival suits, the life rafts and so on.

Senator **KERRY**. Well, do they need to be schooled in it, or would the licensing take care of that? I mean, if you're not schooled in it you are not going to get your license.

Mr. **NALL**. Well, if there were an examination, a brief examination, to be given, one would not have to go to school if he could pass the examination.

Senator **KERRY**. Excuse me, Senator.

Senator **CHAFEE**. Hardly on the same scale of life saving consequences, but we do see in many States, certainly in my States, where they have auto inspections. That is farmed out, and it is not done by the State; it is done by the local service station.

Now they are restricting more. And in any of these inspections, there is always the concern that if it is not done by the government, then there will be a tremendous leniency, because if you do not give the license, if it is a private person doing the licensing, if you do not give the license, they will not come back to you, and this sort of casualness about the whole business.

Do you see anyway that we could have other than the Coast Guard do such training and licensing of the skippers?

Mr. **NALL**. We have discussed this. In fact, the staff and I this morning discussed the very issue. And if that is the only way we can go, we would like to see at least that method of inspection required.

It does have inherent problems with it. There are some conflicts of interest that you have pointed out. They exist in other parts of this same industry.

They are unlicensed persons, the ship surveyors, and there is some conflict of interest that exists.

But I think if they are properly trained, if there is surveillance of their work, and auditing of their work by the Coast Guard. Yes, that could be a consideration, and we would recommend the employment of that type of inspection.

Mrs. **Barry**. I wonder if I could comment on that. The father of one of the other young men who was lost on the *Western Sea* is from Seattle.

And he, just to test who was qualified to be an inspector, went in and gave him $15 and came away with a plaque up on his wall saying that he's a marine inspector, a license marine inspector.

So obviously there has to be some really—if we get into third party inspectors, there has to be a regular system for their being trained and licensed.

Senator **Chafee**. Who's going to inspect the inspectors?

Mr. **Nall**. That is it. That is why I say it has to be audited. There has to be surveillance by the Coast Guard.

Senator **Chafee**. Mr. Costakes testified that operating out of New Bedford, which is a very major port, he could list the number of vessels that he lost on one hand in the past several years.

I must say I am appalled at these statistics which I cited myself of 250 vessels lost a year. Are these—where are these vessels operating out of?

One of our prior witnesses said that it was not necessarily restricted to one section or another. In the examples you cited, one was operating out of Delaware and one was operating out of Florida.

The other information seems to be that most of the examples are these ones operating in the North Pacific.

Is there any area that is worse than others as far as losses, statistically?

Mr. **Nall**. If we can generalize, we can probably say, in the northern reaches of Atlantic and Pacific. The accidents are more prevalent there. The loss of life is more prevalent there.

The weather conditions are certainly more demanding in the northern areas.

But there is no one particular area that seemingly has a higher or lower rate than any others except for those differences in the climate.

Senator **Chafee**. Now a final question if I might.

It seems to me that we would get into a lot of trouble if we tried to have a licensing of every lobsterman who's operating out of a port of Massachusetts or in his own lobster boat, going out, running a couple hundred lobster pots a day, traps a day.

Would you envision that person falling under the category of being a skipper and needing a——

Senator **Kerry**. We do license them. We do license them now for lobsters.

Senator **Chafee**. Yes, but he doesn't go through any course. He has to get a license in order to have his traps.

But I mean, all he's got to show there is that he's a citizen of the State, and pay the fee, and the purpose of that is really to—there is no training.

Would you envision your training requirements apply to that kind of person?

Mr. **Nall**. No, sir.

Senator **Chafee**. Because he's not a documented vessel?

Mr. **Nall**. That's correct.

Senator CHAFEE. You would make the difference the documented vessel?

Mr. NALL. That is correct.

Senator CHAFEE. Is it possible for the vessel like the *Western Sea*, could they come in under an undocumented vessel?

Mr. NALL. No, sir. They would be covered. That is the very type of vessel we are after.

Senator CHAFEE. That is right. But if they say, well, I am going to avoid that, as I understand the difference between the way you have to be documented it is based on tonnage.

Would these vessels all exceed that tonnage?

Mr. NALL. Let me allow Mr. Colucciello to expand on that. I believe he could help us better than I.

Mr. COLUCCIELLO. Yes, sir. They are in a commercial fishing vessel operation, and they are over 5 net tons.

This encompasses virtually all of the kinds of fishing vessels we are talking about. They are in excess of 30 feet essentially.

Senator CHAFEE. Thank you very much, Mr. Chairman.

Senator KERRY. Thank you. I have no further questions of the panel. I would like to thank you.

One thing I would like to ask you, Mr. Nall. We do not have a copy of that report that you referred to, and if you could submit that we would appreciate it.

Mr. NALL. The ink is still wet. We will give it to your staff and to any other committee members.

Thank you so much for your attention.

Senator KERRY. We appreciate that.

If I could ask Ms. Marilyn Lytle and Mr. Schechter and Mr. White to all come, we are going to join your panels, since we are running a little bit behind here.

There is no significance in the empty seat between the two of you there, is there?

Ms. Lytle, if you would go ahead and proceed, please. State your name and who you represent for the record.

Thank you.

## STATEMENTS OF MARILYN L. LYTLE, COUNSEL, AMERICAN INSTITUTE OF MARINE UNDERWRITERS; RICHARD SCHECHTER, CHAIRMAN, ADMIRALTY LAW SECTION, ASSOCIATION OF TRIAL LAWYERS OF AMERICA; AND ED WHITE, VICE-CHAIRMAN

Ms. LYTLE. My name is Marilyn Lytle, and my testimony today is presented on behalf of the American Institute of Marine Underwriters, which is a trade association representing some 120 insurance companies which underwrite 90 percent of the marine insurance business written in this country.

We would like to point out, however, that the bulk of the fishing vessel insurance premiums written on American fishing vessels is written by companies not affiliated by AIMU.

But there is no other organized voice for marine insurers in this country, and our members are cooperating with industry and Congress, because the current problems associated with fishing vessels are a matter of great concern to us.

In order that we could speak meaningfully about our experience in this class of business, we conducted a survey. And that survey clearly shows that AIMU members experience in the fishing vessel insurance market has been disastrous.

The combined loss and expense ratio for AIMU companies writing fishing vessel insurance was approximately 156 percent over the five-year period study.

That means that for every dollar taken in by the companies in this class of business, $1.56 was expended. If there's been any question about why it's become difficult to obtain fish boat insurance, these figures should explain that.

On balance, insurers have been paying out more for a period of years than they have been taking in in this class of business.

In order to cure this problem, insurance companies have either gotten out of the fishing insurance business, or have raised premiums to correct the cash flow imbalance.

The factors which have created these disastrous results include lack of safety requirements and regular inspection; deteriorating economic conditions within the fishing industry; declining catch; foreign competition; design instability problems; lack of vessel maintenance; the tort system; and the consequent difficulties in rating P&I policies; and the high interest rates on the cash flow underwriting that occurred some years ago.

In order that fishing vessels become the more attractive risk, losses must be more predictable and less frequent.

Of course we support the safety measures in S. 849, and we also encourage that crew training be adopted.

AIMU also supports certification of operating stability, but it is important that these certifications be conducted by marine surveyors with the technical expertise to provide such certification.

And placing responsibility to certify operating stability on insurers can only discourage growth in capacity.

One of the most troublesome aspects of S. 849 for marine insurers is the fact that it would not attempt to cap vessel owner's liability for nonpecuniary damages.

This represents a substantial retreat from the original concept of this legislation.

As we understood it, the original purpose of the limitation or cap was to introduce some stability in fishing vessel P&I claims.

Clearly the removal of one of the original goals in enacting this legislation can only make the legislation less effective in reducing claims and increaing predictability.

There are a number of other areas that we are concerned about in the bill that are discussed in more detail in my testimony. But among them are the definition of temporary illness; gross negligence or wilfull misconduct; and the term "maintenance" needs to be tightened up.

And finally I would like to indicate that the bill would also require the compilation of vessel casualty statistics based upon data from insurers of fishing vessels.

The purpose of this provision is unclear to us, since the Marine Index Bureau has begun collection just such information from marine insurers.

AIMU has been effective in facilitating this program, and we question whether it is necessary or desirable to have the Federal Government duplicate this voluntary program.

This program, the Marine index program, is the one that the gentleman from NOAA was discussing.

[The statement follows:]

### STATEMENT OF THE AMERICAN INSTITUTE OF MARINE UNDERWRITERS

The American Institute of Marine Underwriters (AIMU) is pleased to have this opportunity to present comments on the subject of fishing vessel safety and compensation. My name is Marilyn Lytle and I am a partner in the law firm of Bigham, Englar, Jones & Houston, counsel to the American Institute of Marine Underwriters (AIMU). My testimony today is presented on behalf of AIMU.

AIMU is a trade association of some 120 insurance companies which underwrite about 90% of the marine insurance written in the United States, so it naturally has a keen interest in any problems which beset any segment of the maritime industry served by its members. To be fair, however, we should put the fishing vessel insurance market in perspective. Most of those underwriting fishing vessel risks in the country do not belong to AIMU. Because it is a very specialized area, this class of business constitutes a very small percentage of the marine insurance written by AIMU members overall. We estimate that fishing vessel insurance makes up less than 5% of the marine insurance written by AIMU members during the past five years. Many marine insurers traditionally have not entered the market for reasons which have nothing to do with the current crisis. We know that some AIMU members have recently withdrawn from the fishing vessel insurance market or have severely curtailed activities in this class of business. There are a large number of small local or regional insurance companies and many large and small foreign carriers (non AIMU members) which do insure fishing vessels. While the bulk of fishing vessel insurance premiums written on American fishing vessels is written by companies not affiliated with AIMU, there is no other organized voice for marine insurers in this country. Our members are cooperating with industry and Congress because current problems associated with insurance of fishing vessels are a matter of concern. AIMU has been working with a number of groups in attempting to analyze and quantify the problems which have led to difficulties in obtaining fishing vessels insurance at prices deemed reasonable by operators. We have worked with the National Marine Fisheries Service, the National Council on Fishing Vessel Safety and Insurance, and the Marine Index Bureau, among others in gathering data which we believe should be helpful and which may point towards solutions.

AIMU has also established a Fisheries Insurance Committee made up of underwriters experienced in insuring fishing vessels. As AIMU reported in our testimony before the Senate Subcommittee on Merchant Marine, the AIMU Fisheries Committee conducted a survey designed to produce loss figures. The survey clearly shows that AIMU members' experience in the fishing vessel insurance market has been disastrous. According to the final response received, AIMU members collected $170,194,000 in gross premiums on both hull and P & I coverages on fishboats between 1980 and 1984. During the same time period, they paid out $213,933,000 in losses. Add to this insurance companies' cost of doing business, and you find the combined loss and expense ration for AIMU companies writing fishing vessel insurance was approximately 156% over that five year period. That means that for every dollar taken in by the companies in this class of business, $1.56 has been expended. If there has been any question in anybody's mind, about why it has become difficult to obtain fishboat insurance, these figures should provide the answer.

Let's take a look at insurance for a minute. What does it really do? It is a method of moving monies among a group of people so that one of the group will not be financially devastated by one incident. The insurance carrier takes in these monies and pays out for that incident. But this is not one dollar in and one dollar out. A commission must be paid, the office rented, typewriters purchased, and personnel paid. And under our system of free enterprise the owners of the insurance carrier are, over the long run, at least entitled to a return on their investment. Thus you can see the inevitable interrelationship between premium income on the one side and loss payments on the other. Any situation where loss payments and expenses start to exceed a combination of premium income and investment income must be redressed eventually or investors will leave or not enter the business.

An abysmal loss record and overzealous competition in the past have lead to a situation where the marine insurance industry has on balance been paying out more over a period of years than it has been taking in. In order to cure this problem insurance companies have either gotten out of fishing insurance or have raised premiums to correct that cash flow imbalance.

The Committee has heard testimony on the factors which have created these disastrous results for the fishing vessel insurance market. Those problems include: lack of safety requirements and regular inspection, deteriorating economic conditions within the fisheries industries, declining catch, foreign competition, design and stability problems, and lack of vessel maintenance.

Of course, in addition to the safety and economic conditions, the tort system itself has contributed to the worsening results. Underwriters can no longer anticipate the amount of court or jury awards in personal injury cases. The cost of litigating such cases including the cost of contingent fees for plaintiffs' attorneys also contribute to the worsening results. It has become increasingly difficult to rate a P & I policy because of the inability to predict costs associated with such awards. High interest rates and cash flow underwriting exacerbated the situation a few years ago by artificallly lowering rates for some vessels.

It is against this back that AIMU members welcome the Committee's efforts to find solutions to the problems faced by the fisheries industry and insurers.

AIMU believes that as insurers commenting upon legislation before Congress they should not tell Congress what the law should be on liability or safety issues. Rather, AIMU, exercising professional underwriting judgment, would like to comment on the possible effects of any proposed legislation on the risks of the vessel owner. In order that fishing vessels become a more attractive risk, losses must be more predictable and less frequent. The Committee has received extensive testimony on the hazardous nature of the fisheries industry. We note that the safety provisions under consideration in S. 849 appear to be somewhat more stringent than prior versions of this legislation. Obviously, safety is an important factor in the loss experience among fishing vessels and the various safety devices and measures to be required on board fishing vessels are certainly appropriate. Crew training is equally as important as the installation of safety equipment, however, and we urge that fishing vessel owners implement crew training such as emergency drills and certification of vessel safety programs among crew members.

S. 849 provides for the regulation of operating stability of certain fishing vessels. As currenty drafted, the bill would permit the Secretary to accept as evidence of compliance with operating stability regulations a certificate supplied by an insurer. AIMU has always supported requiring certification of operating stability but it is imperative that this be conducted by a marine surveyor who has the technical expertise to provide such certification. Erroneously placing the responsibility to certify operating stability on insurers can only discourage the growth in capability. Insurers themselves are not in a position to certify operating stability which involves very technical analysis. We urge that appropriate personnel such as marine surveyors or the Coast Guard be entrusted with this responsibility. The placement of this additional responsibility upon insurers who will inevitably have to hire a marine surveyor to make the technical analysis will only increase adminstative costs. Many insurers may shy away from underwriting fishing vessels for fear of liability for such certification.

One of the most troublesome aspects of S. 849 for marine insurers is the fact that it would not attempt to cap vessel owners' liability for non-pecuniary damages. This represents a substantial retreat from the original concept of this legislation. As we understood it, the original purpose of the limitation or cap was to introduce some stability into fishing vessel P & I claims.

The degree to which future rates and capacity in the fishing vessel insurance market are affected by safety and compensation legislation will depend upon its effectiveness in improving safety and thereby reducing claims and how successful the legislation is in attempting to limit non-pecuniary damages. Clearly, the removal of one of the original goals in enacting this legislation can only make the legislation less effective in reducing claims and increasing predictability

S. 849 contains a proposal which would purportedly end civil law suits for temporary injury and in its place provide a system of compensation. Marine insurers are concerned that the definition of temporary illness be clearly established. As currently drafted, the question of whether an injury would be temporary or permanent could be subject to expensive litigation. There is even the possiblity that the vessel owner would have to pay the proposed high "maintenance" levels plus cure and still be subject to suit later when the seaman decided to argue that his injury was permanent. The bill does not set out how a court should treat such maintenance payments when establishing a court award, leaving open the possibility of "double dipping" for lost wages. Perhaps requiring that a determination on permanency of an injury be made by a panel of doctors would help make this system more predictable.

The bar to a civil action is effective only when the vessel owner or employer had not enagaged in "gross negligence or willful misconduct." We believe that this loosely worded standard may increase litigation, encouraging attempts to recover punitive damages. Findings of gross negligence and punitive damages would substantially increase P & I claims which would inevitably be reflected in rates. Furthermore, there is no provision concerning third-party actions brought against fishing vessel owners. If a seaman on board a fishing vessel were injured and sued a manufacturer or another crewman on board the vessel for injuries sustained, the manufacturer could institute a third-party action against the vessel owner, whether or not maintenance had been paid. If plaintiffs' attorneys are permitted to circumvent this bar to civil action through third-party actions or other possible loopholes, the bill would not achieve its desired purpose—a reduction in the high cost of P & I claims. Under S. 849, maintenance would be measured by 80% of the wage or share the seaman would have received for that day if he had been employed on the vessel or $30.00. We believe that the amount of wages used in this calculation should be measured by the amount reported to the Internal Revenue Service as earnings as a fisherman by the seaman in the preceding year. Furthermore, the use of the term "maintenance" as it has been traditionally understood may no longer be appropriate here since this provision would replace it with a percentage of earned income.

As the Committee knows, there are a number of areas where fishing vessels operate seasonally. Seamen are not employed on vessels during the off-season and may find employment elsewhere during that period. Under the proposal as it stands, seamen who claim a temporary injury during the season which extends throughout the off-season would find themselves in a better position than those who were not injured. This would appear to encourage malingerers, no doubt increasing the cost of the insurance product associated with the program.

The bill would also require the compilation of vessel casualty statistics based upon data from insurers of fishing vessels. The purpose of this provision is unclear since the Marine Index Bureau has begun collecting just such information from marine insurers. AIMU has been active in facilitating this program. We question whether it is necessary or desirable to have the Federal Government duplicate this voluntary program. It is also unclear how such statistics would be obtained from those many foreign underwriters providing insurance on fishing vessels who are not admitted in the United States and consequently may not be subject to its laws. This will further disadvantage marine insurers subject to U.S. law.

Thank you. We would be pleased to answer any questions the Committee may have.

Senator KERRY. Thank you very much.

Mr. Schechter.

Mr. SCHECHTER. Thank you, Senator.

My name is Richard Schechter, and it is my privilege, along with Mr. Ed White of New Bedford, Massachusetts to have the opportunity to appear here today.

We appear here on behalf of the American Trial Lawyers Association, which is an organization of attorneys, approximately 60,000 strong, a section of which is composed of attorneys who practice in the area loosely known as admiralty.

We also are lawyers who represent clients, individuals. I suspect amongst us we've represented over the years tens of thousands of fishermen who have been injured in the course of their employment on vessels.

Let me start my testimony by saying that the American Trial Lawyers Association wholly endorses the safety provisions of S. 849. However, we believe that they probably do not go far enough.

We are firm believers in the provisions contained in the bill introduced in the House by Congressman Lowry, H.R. 1836. We endorse many of the things said by Mrs. Barry at her testimony previously, as well as the suggestions made by the National Transportation and Safety Board.

We would note, Senator, that the primary way to minimize injuries is to start with design and cure problems that exist with design. When you fall back to attempting to train people, you are talking about the least effective method in the safety scheme of preventing injuries.

Our problem with S. 849 starts with the compensation sections. We simply disagree with the need, Senator, for any such provision. I think the basis for our disagreement was just demonstrated by Ms. Lytle from the insurance industry.

We do not believe that any of the proposals made in S. 849 are going to reduce the cost of insurance. You just heard her say that removing caps on damages eliminates or reduces the predictability.

We do not believe that caps on damage ever establish predictability or will ever increase insurance availability. This has clearly been demonstrated in the states. It is certain that the proposals offered in S. 849 are not going to do anything to affect insurance rates or availability.

We simply do not believe that this insurance crisis is one caused by temporary injuries. We do not believe that this system is going to reduce the cost of insurance. The primary cost of insurance, Senators, arises not from personal injuries but from the hull insurance that is required for each vessel to pay for damage to the vessel itself.

In many insurance policies, the hull insurance comprises two-thirds to 75 percent of the insurance cost. So what you are talking about is trying to deal with a small percentage of the insurance cost.

That is not going to reduce rates. It can not be demonstrated that it is going to reduce rates.

We believe that safety legislation should be passed immediately, without regard to compensation provisions. We would note that improved safety will only reduce accidents, which will only reduce the cost of insurance, if indeed such a reduction is passed on.

We disagree with the provisions of S. 849 in many particulars, which we will be happy to address in questioning.

We disagree with the definition of temporary disability, the notice provisions, the statute of limitation, and we feel that a method needs to be devised of ensuring prompt payment of what is called maintenance and cure, or in the new House draft, cure and compensation.

We believe that the whole bill is ambiguous in this regard, and is going to lead to years of litigation in the court system to try to determine what is meant by its provisions.

[The statement follows:]

## STATEMENT OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA

Mr. Chairman, the Association of Trial Lawyers of America (ATLA) believes that fishing vessel safety and the method of compensatng fishermen for work-related injuries are important and difficult issues worthy of national attention. We appreciate the opportunty to contribute to the ongoing process of congressional consideration of these matters.

ATLA believes that as presently drafted S. 849 requires fishermen to give up too many rights without appropriate return in either compensation benefits or safety improvements. Emphatically, however, that does not mean that ATLA categorically opposes any maritime legislation that would address the issue of compensation for temporary injury. Nor does it mean we believe S. 849 is hopelessly flawed. We believe its shortcomings can be remedied and if they are, we foresee no reason why ATLA would oppose the bill.

Most important, our present concern with S. 849 does not mean we oppose legislation that would result in safer fishing vessels. We support in its entirety Title II of S. 849, the safety provisions of the bill. If anything, those provisions do not go far enough in mandating safer vessels. We believe that H.R. 1836, introduced by Congressman Lowry and currently pending before the House Committee on Merchant Marine and Fisheries, represents a preferable approach. That bill would mandate the inspection of vessels, the licensing of operators, and the training of crew. For those reasons, while we support Title II of S. 849, H.R. 1836 is frankly far more protective of the safety of fishermen and therefore vastly perferable.

Mr. Chairman, a year ago, when the House of Representatives soundly defeated H.R. 5013—the predecessor of this year's proposal—there were some who accused ATLA of not being interested in safer fishing vessels. That was not true then. It is not true now. Indeed, we support H.R. 1836 over S. 849 precisely because the former will make fishing boats safer than the latter. We believe a pure safety bill ought to be passed without delay and without linkage to the compensation issue. As we've stated, the provisions of S. 849 on the safety issues are not without merit. However, the enhanced safety provisions contained in the Lowry bill are vastly superior and if in fact safety is to be addressed in a package that modifies or eliminates fishermen's existing rights, then it ought to be in the manner of H.R. 1836.

ATLA strenuously opposed H.R. 5013 in the 99th Congress because it severely limited the rights of seriously injured fishermen and the rights of survivors of those killed in fishing vessel accidents. ATLA stated last year that it could support an acceptable "temporary injury" compensation bill, and as we've testified today, it maintains that position. S. 849 does not contain the highly inequitable cap on compensation for permanent injury or death that was contained in last year's bill. However, several modifications to the compensation section of S. 849 remain necessary. The proposal is still flawed for reasons we have identified before, to wit: temporary injuries are not adequately or appropriately defined; the methods of determining substantially of anatomical losses and/or disfigurement remain uncertain; the timeliness of adequate compensation is not guaranteed; statutes of limitations are unfairly abbreviated and the appropriate, automatic adjustment of benefits for temporary injuries is not provided. We're concerned, too, that because the system as it is now being proposed would permit the boat owner/insurer to choose whether to pay the statutory maintenance and cure, it might result in fishermen being treated unequally based on subjective judgments.

In summary, Mr. Chairman, because S. 849 moves away from some of the more onerous consequences of last year's proposal, it is a first step in the right direction. We believe the remaining shortcomings in the compensation title, though serious, are correctable. In addition, the safety provisions, though laudable, can be made stronger by incorporating the language of H.R. 1836.

Thank you for the opportunity to present our views.

Senator KERRY. By which provisions?

Mr. SCHECHTER. Specifically by the provisions that focus on what is a temporary disability and how it comes into play.

If a demonstration is made that a system of some form of compensation is desirable for genuinely temporary injuries, we are not opposed to it with the proper language and the proper drafting.

No demonstration has been made, and we would respectfully submit that the language in this bill is not the proper language for such a system. And that is basically our position, sir.

Senator KERRY. For which system? Language in this bill is not the proper language for——

Mr. SCHECHTER. If you are going to have a system of compensating people in some type of quasi-workers compensation scheme, then the language in this bill is not, we believe——

Senator KERRY. Okay, well, let us begin with that. Let us assume that the language, I do not want to assume it is. But for purposes of argument here, let us say the language is defective regarding compensation.

Do you accept the notion that particularly in Massachusetts where we had an experience with tort reform, there was a very salutory effect with respect to the process as a result of a strict system set up. Is that not accurate?

Mr. WHITE. I do not think, Senator, that there is enough evidence to warrant that conclusion yet.

I think that maybe if the Senators were to take another look at this bill as contrasted with H.R. 5013 of last year, there is a significant difference.

Not only has the cap on damages been removed, that is not necessarily the only reason why we opposed the bill last year. It happens to be, though, the bellweather that attracted most of the attention.

I think what the Senators need to really realize in looking at this bill now from the perspective of the fishermen, from the injured fisherman who needs the compensation is, what does this bill actually do, what does it actually change.

And I think that if you were to take a look at it, you would realize that it essentially attempts to impose a workmens compensation system that is totally inadequate, under the circumstances, as contrasted to a state workmens compensation system or a Federal workmens compensation system.

And quite frankly, that is one of the major difficulties with the bill, is that it grossly discriminates against injured fishermen.

Senator KERRY. Why is it, there is no intent, obviously, to discriminate. Then why is it inadequate?

Mr. WHITE. Senator, some fishermen leaving from pier three in New Bedford, where you toured the other day, are earning this year $52,000.

So a fisherman could earn $52,000, sir. If he has a temporary injury, let us say some type of a lumbar sprain or what have you that may disable him for six months, nine months, or what have you.

If you take a look at the compensation system that you have set up here, if the vessel is lost, if the vessel founders, you have no protections in terms of where the vessel may be.

You may leave that fisherman at $30 per day for a period of six months. That means a fisherman who would have earned——

Senator KERRY. No, no, no. He would not be a $30 a day, unless he was earning $30 or less.

He would be at 80 percent of what he was earning, assuming he was earning more than $30 a day.

Mr. WHITE. Senator, the difficulty with the language, under section 2(a) for each day that the vessel is on a voyage, and then when it describes that, Senator, there is no protection whatsoever for the fisherman, if that vessel is sold, if that vessel sinks, if the ownership is transferred, if it removes to another fishery in another jurisdiction.

So essentially then——

Senator KERRY. Well, hold on a second now. If he is injured, let us go slowly. We do not need to rush through it.

If he is injured, he is injured, he is not on the vessel. Correct?

Mr. WHITE. Correct.

Senator KERRY. I am sure we can construct language here that safeguards definitionally whether the vessel has been sold or is somehow not operative, that he still gets compensation if he was on a voyage and was injured, presuming it is a temporary injury. Correct?

Mr. WHITE. Correct.

Senator KERRY. If it is not temporary, he is going to be able to sue.

Mr. WHITE. That is also correct, Senator.

Senator KERRY. So if it is temporary and the vessel was sold, no matter what the compensation system, he is going to have to find some other vessel to sail on.

So what we are trying to do is compensate within the framework of a legitimate injury for the period during which time he is not working.

Now, why, therefore, is it not possible to construct in simple language 80 percent, adequate compensation during the time of injury? Why is that not adequate?

Mr. WHITE. Senator, if you cannot insure that the injured fisherman, who would in fact receive 80 percent of his pre-injury wages, that would be adequate, sir, for a temporary injury.

Senator KERRY. What is there in this language that does not ensure that?

Mr. WHITE. As I say, if the vessel is sold, if the vessel is seized, if the vessel is transferred.

Senator KERRY. Okay, so we could address that.

Mr. WHITE. That is one of the problems.

Senator KERRY. What is the next problem?

Mr. SCHECHTER. Additionally, Senator, you have the problem of what happens if the vessel owner simply decides not to pay the compensation.

Suppose the vessel owner evaluates how the injury occurred and decides there is no exposure, that he has no liability. So not only is he not going to pay the maintenance and cure, that under old law he would be obligated to pay or the punitive damages he would owe, he is not going to pay it under this law.

There is no provision that the seaman can sue for maintenance or cure under this law. There is no punishment provision. The only thing the seaman can sue for is general damages and the vessel owner is going to win.

Senator KERRY. Under subsection, (b) does not apply, under Title I, section 101, subsection (c), subsection (d) would not apply, if, and one of the things that section three then says, payment or provision of maintenance and cure is not made. So he can sue.

Mr. SCHECHTER. Can he sue for maintenance and cure?

Senator KERRY. He can sue for maintenance and cure.

Mr. SCHECHTER. That needs to be clarified, Senator. The fact that the current remedies under *Vaughn* v. *Atkinson* and many of the 5th circuit cases which allowed suing for exacerbation of injuries due to failure to pay maintenance and cure, as well as punitive damages, will still be available if the vessel owner does not adhere to the new law.

It needs to be clear that those are available if maintenance is——

Senator KERRY. Let us assume that we clear that up. Where are we?

Mr. SCHECHTER. Our problem, our major problem is in the definition of temporary disability.

Senator KERRY. Help us with that. What do you think we can do with respect to that? There has got to be a way.

Mr. SCHECHTER. Which one are we looking at, Senator? Are we looking at, I was told to bring up the new House proposed draft, as well as S. 849.

Senator KERRY. Can you suggest to us language that you feel is appropriate. I share with you the profession, I have been in port, I think we can come to some understanding of what a temporary injury is.

Mr. SCHECHTER. Senator, without giving you exact framework, exact language off the cuff, which would be I think a mistake on my part, we would propose, when you are talking about a temporary you are talking about something in time.

So let us have a time cutoff. Any injury that extends over a certain period of time is no longer a temporary injury. I am reluctant to put a figure out, but let us say, for example, without binding us to it, 12 weeks. Any injury that extends over 12 weeks is by definition not temporary.

Second, let us look at what the individual is left with after the injury. Does he have any physical or economic impairment, because that is really the question. You cannot have a temporary injury if you have some physical impairment left, or some economic impairment left.

They are mutually exclusive. In the House of Representatives draft, under section 21(2)(c), it now provides, "does not suffer substantial physical permanent impairment". What does substantial mean?

Does that mean 50 percent, 20 percent? What about the man with the operated back who has a 15 percent disability? Is that substantial? Where is the line drawn?

The way the language is drafted, Senator, what you are doing is kind of an interesting thing, you are not capping damages for the most horribly injured. You are throwing the people who are injured below the most horribly and obviously injured out of court.

And you are sticking them with a cure system that does not provide them any medical care beyond those initial payments until they reach maximum medical cure, and you are limiting them to $30 or 80 percent. Additionally, what do you mean by, "during the period of the illness, disability, or injury?"

Does that go until they reach maximum medical cure? Does it go until they are through the whole course of their injury?

If they have problems for the rest of their lives, but it is not enough to be a substantial permanent impairment, do they still get 80 percent or $30 a day because the illness has lingered on, even though it is not a substantial permanent impairment?

I guess our problem with the language, Senator, is that we see what is going to happen when we get down the road at the courthouse.

Senator KERRY. Or what happens if you do not get to the courthouse.

Mr. SCHECHTER. Right. When this thing goes up on appeal and the Supreme Court or the Court of Appeals is looking at the original intent of the architects of the language, if you will, and then all of a sudden we have just got some language that is contradictory, that is our——

Senator KERRY. I do not want to dwell on this too long, and I want Senator Chafee to have a chance, and we are running over. We have some time problems.

But I would like to know is, you guys have 60,000 lawyers. There ought to be a way for you to submit to us some language that adequately defines temporary. I mean, are you willing to do that?

Mr. SCHECHTER. Senator, I think we would be willing to sit down and brainstorm on it. It will not be something we can do tomorrow or next week, especially since we are so spread out.

But we will sit down and look at it and exchange some language back and forth and look at it.

Senator KERRY. Let me just say to you with all due respect, you know there has been a real effort here. We have got a problem, and it is a really serious problem.

There is a whole parameter of things that are involved here. I think Mrs. Barry has made it very clear about perhaps the most compelling parameter of it.

Besides human life, which is at stake, we have obviously got a very serious problem with people who are not able to get insurance, who are working at enormous risk.

And we do have a problem with the compensation system right now, where you have crew men who come in and have this interminable injury question, and you know we go the compensation route.

And I know the stories, I know what happens out there. I know the settlements that take place, after two or three years of waiting and building up the process. And, you know, let us just talk turkey. That is what goes on.

And we know it. And there is a problem. Now, I think there is fault on a lot of different sides. I am not pointing only at the system. But you know what is happening? We are losing an industry.

And we have got a choice to make. You know, if we are going to compete with other people in other countries, being shut out from some of the Canadian waters and having processing problems and then countervailing duties imposed, and then fillets come in instead of whole fish, and the processers get involved, and the whole tension is created.

And meanwhile what happens? Meanwhile, we see New Bedford, which is the number one fishing port, and other ports put under enormous strain. And I just think we have got to be serious about getting together and working out some kind of a compromise. Because that is what this is all about.

Now we got rid of the $500,000 cap as a measure of good faith in an effort to come up with a compromise. And what I think is going to happen ultimately, because I think it is building up in the Congress, is that people are going to respond to this issue because there are enough Senators and enough Congressmen representing coastal states around the country who are going to be able to persuade their colleagues that we are going to have to come up with a response.

And unless we can do it in a fashion that really gets us together working at it, somebody is going to get left behind and then going to wind up with something they do not like because they were not part of the party.

So I hope that we can really work together to come up with a reasonable compensation process on this.

Mr. SCHECHTER. Senator, let me note that we have never opposed working with anybody. We attempted to work with the people in the House of Representatives last time, to come up with a viable alternative.

It is just that apparently our view is not shared by everybody. And frankly I find it hard to believe that we are going to be blamed, the trial lawyers are going to be blamed.

Senator KERRY. No one is saying anything about blaming you. I said there are different parties with different interests here.

But this process is all about working out compromises reasonably in an effort to try to come up with a solution to a real problem that is an economic problem, a human problem. We can deal with it, I think.

Quick question on the insurance side of this. Predictability. You said that on predictability, you thought it was less effective having gotten rid of the cap, that that was somehow going to affect your predictability and the reduction of claims.

I am not sure why there is a linkage between predictability and why that is so important. And why there would still not be a reduction in claims with the cap gone.

Ms. LYTLE. Well, the larger claims that really hit the big numbers, it is one aspect of the problem, and it is not the entire aspect.

But I believe that the original bill that we looked at one or two years ago was developed in response to a study done by Prof. Nixon. And it contained by the compensation system and the cap. And at that time we said, this is a good start at reaching a solution.

Now, the cap was removed, and that is just one aspect of the problem that is not being addressed by the bill. And we feel that it is our role in this to indicate that it may not be as effective in correcting the problem, the insurance problem.

Senator KERRY. You would not disagree that a significant part of the cost has been wrapped up in the individual claims and in the current tort process. Or do you?

Ms. LYTLE. Well the compensation scheme, as it is in the bill, addresses one——

Senator KERRY. Well, what do you say to the comment of Mr. Schechter that most of the cost of insurance is in the hull insurance? Do you agree with that?

Ms. LYTLE. That is in complete contradiction to everything that I understand about the nature of the problem. I never heard anybody say that before.

Senator KERRY. So you are saying that there is a significant cost of insurance that is part of the claim and liability.

Ms. LYTLE. Absolutely. It is my understanding that the P&I costs are the main problem.

Senator **Kerry**. We are going to have to get at that somehow, and I think staff here is going to have to work at trying to distinguish that a little bit. But we are not going to solve it here now.

But if you have an 80 percent, if you have a payout similar to that which is set forth in this bill, is that going to reduce the cost of insurance or not?

Ms. **Lytle**. We believe that if the bill were drafted along the lines, and there are a number of suggestions we make about clearing up what a temporary illness is, and exactly what maintenance is and the gross negligence part and so on, if all of those things were cleared up, that it may have a beneficial effect.

Senator **Kerry**. May have or will have?

Ms. **Lytle**. We could only say may, because we have to have the experience. And if the losses are reduced, then the insurance rates will go down.

Senator **Kerry**. So you are telling me that there is no way, with all of your ability to produce actuarials and predictions and cost out your business, and you are going to tell us that there is an insurance problem because there are in fact claims, and we are going to in fact show you how we can reduce *X* number of claims, you are going to then tell me that you cannot say it is going to go down in cost?

Ms. **Lytle**. That is right.

Senator **Kerry**. I do not understand that.

Ms. **Lytle**. Well, the underwriters feel that they have to have the experience of decreasing claims. And as I said, the bill——

Senator **Kerry**. Well, how can you then tell us factually that this is the reason for the current cost?

Ms. **Lytle**. It is only one of the——

Senator **Kerry**. We are going to reduce one of the factors for the current cost, how can you not also tell me we are going to reduce the cost?

Ms. **Lytle**. We do expect it to have a beneficial effect.

Senator **Kerry**. That is not what you just said. I mean, I do not want to pass this legislation if you are not going to tell the cost does not go down.

I mean, I want to pass the safety parts of it. But we are not going to go through this exercise to have you folks raise the rates of insurance.

Ms. **Lytle**. There are other factors besides claims. As I indicated, high interest rates can also have an effect on stability of rates and so on, and other economic factors.

And I think it would be presumptuous of us to predict the future in that sense. But we do expect that if we, if a bill were fashioned in the manner in which we discussed in our testimony, that it will have a beneficial effect.

Senator **Kerry**. Okay. Well, I appreciate that. I think we are going to have to kind of dig into that a little bit further as we go along here. Senator Chafee?

Senator **Chafee**. Thank you, Mr. Chairman.

Senator **Kerry**. Excuse me. Let me just say this. I have to go to another appointment, so if I could leave you to close out the hearing, I would appreciate it enormously. And I thank the panel.

Senator CHAFEE. I thank you, Mr. Chairman. Mr. Schechter, you indicated that you would be prepared to help submit some language on defining what is temporary injury.

But why have you not done that in the past? Have you never been requested to do that? I mean, we have, not we, but the House has been working on this for a good number of years and a good number of months.

And I know you had a vigorous exchange with Congressman Studds on this matter. Why have you not submitted alternate language, if you oppose the language that is here?

Mr. SCHECHTER. May I ask Mr. White one question?

Senator CHAFEE. Sure.

[Pause.]

Mr. SCHECHTER. Senator, what happened last year, the bill that was introduced in the House of Representatives contained a cap on damages.

We never got much beyond that. That bill got beat badly on the floor of the House. Some negotiations took place after that which produced the letter from Mr. Habush, that you cited earlier.

And I believe, although I am not positive, that in those negotiations afterwards, we mentioned and discussed with the people in the House of Representatives, including Representative Studd's staff the concepts that we had of incorporating a timeframe in the definition of temporary disability, as well as tightening the definition of temporary disability so that it genuinely reflected a temporary disability and excluded those with permanent disabilities.

Senator CHAFEE. Okay. All of us are caught short with time here, and there is a Constitutional celebration in just a few minutes outside.

So if you could kind of keep your answers crisp, I would appreciate it, without obviously giving up any of the meaning that you wish to imply.

Mr. SCHECHTER. My problem is, Senator, I was not involved in those discussions, so I really do not know.

Senator CHAFEE. Now, what would happen if we just went to a complete workmens compensation situation on fishing vessels?

We have it in every factory in the United States. The problems of what state you are in just make the state law of your homeport control, and by homeport, the port that you are principally operating from.

If you are from New Bedford, Massachusetts law would apply, even if the man was injured off the coast of Delaware. What is the matter with that?

Mr. SCHECHTER. May I just answer that in two parts? First of all, I do not think Constitutionally you can. I think the Supreme Court has prohibited making state law applicable to seamen.

But second, if you did what I think you might be suggesting, which is put fishing vessel men under the Longshore and Harbor Workers Compensation Act.

Senator CHAFEE. No, I am not suggesting that, because I think there are great problems with that law itself.

Mr. SCHECHTER. The cost would be three times what it costs currently.

Senator CHAFEE. That is right. I do not think anybody is suggesting that. That would worsen the problem.

But what we are working toward, do you support workmens compensation?

Mr. SCHECHTER. I believe workmens compensation has some good points and bad points, Senator.

It has proven to be non-effective in reducing accidents. The benefits in most states are woefully inadequate. They do not protect the man over the long term. I can tell you, for example, in the State of Texas——

Senator CHAFEE. Do you support it or do you not? Yes or no.

Mr. SCHECHTER. Some aspects are good, some aspects are bad, Senator. It depends on——

Senator CHAFEE. I think we are coming at this from a different point of view. And the, while looking into this, whether it is a Constitutional problem, I am not an expert in this area, and I am interested in that comment you made.

Maybe that is the reason they have never done it. I must say, seamen always have been treated a little bit differently than others. And perhaps there is a Constitutional reason for it.

Mr. SCHECHTER. Senator, I think it is the *Knickerbocker* case out of the United States Supreme Court in the 1920s or right before it, where the question was, Could New York workers compensation apply to seamen.

And the answer was, no, it would be unconstitutional. That is my recollection of the case. But without having looked at it again, please do not hold me to it.

Senator CHAFEE. Let me ask you this. The suggestion was made about the three physicians. What do you think of that?

Mr. SCHECHTER. That is absurd.

Senator CHAFEE. That was a suggestion by Mr. Costakes.

Mr. SCHECHTER. Since when did people's rights get determined by three physicians? That just, they are a screening panel. I find that objectionable.

Senator CHAFEE. Well, in workmens compensation, you can go to workmens compensation court, if you wish. But there is great determination in workmens comp cases, most of them are determined by the doctors, with the right of appeal you can go to the courts.

Mr. SCHECHTER. Well, Senator, I understood the proposal of Mr. Costakes to be, you could not sue unless a panel of three doctors ruled on whether or not you had a temporary illness, which means, three doctors determine whether or not somebody has the right to the courthouse.

Besides it probably violates, the right to trial by jury.

Really what you have done is you have not eliminated lawsuits here with this bill.

You are going to have a question for the jury. Was the injury temporary? You cannot stop the lawsuit from being filed. So now what you are saying is, three physicians can stop the lawsuit from being filed. That violates the right to trial by jury.

Senator CHAFEE. Let me just say I share the Chairman's concern. We have got a problem here. It is causing great difficulties.

We have had a lot of concern from the fishermen and the vessel owners, operators, skippers, everybody involved has indicated there are problems. And we are trying to do something about it. And we look forward to the submission that you might make. That would be helpful to us.

All right, thank you all very much for coming, and that concludes the hearing today.

[Whereupon, at 12:35 p.m. the hearing was adjourned.]

# ADDITIONAL ARTICLES, LETTERS, AND STATEMENTS

## Statement of Bradley D. Brauer, President, East Coast Fisheries Association

Mr. Chairman and distinguished members of the Senate Commerce Committee. My name is Brad Brauer. I am President of East Coast Fisheries Association made up of persons and businesses engaged in the commercial fishing industry who are genuinely interested in promoting the general welfare of the commercial fishing industry of the east coast of the United States.

I thank you for the opportunity to present this statement on behalf of the many members of the fishing industry who are members of, or associated with, East Coast Fisheries Association and are engaged, directly and indirectly, in the production, processing, preserving, distributing and marketing of seafood and seafood products.

Members of our Association have been in Washington many times over the past three years meeting with members of Congress, giving testimony and providing support in other ways for the passage of legislation similar to S.849 which we strongly support as a balanced bill which addresses the difficulties facing the fishing industry. The insurance crisis continues to be a critical issue for fishing vessel owners and operators; and its effects extend to the crew members and the many other people involved in the industry. We need help through enactment of federal legislation such as S.849 and appreciate your continuing efforts for the benefit of our fishing industry.

We recognize the need for continuing the efforts within our fishing industry to improve safety. Many of our vessels have already incorporated most of the safety measures included in S.849. We support the safety provisions of S.849 as being a reasonable means of regulating the entire industry, and, hopefully, of bringing insurance costs down to a reasonable level.

We do support the amendment of S.849 as indicated in the House Subcommittee on Fisheries and Wildlife Conservation and the environment *Staff-Draft August 28, 1987 Updated Version H.R. 1841* (companion bill to S.849) with the exception that we do not support the deletion of *SEC. 102. STATUTE OF LIMITATIONS*. Sec.102 provides for shortening the present three-year statute of limitations to two years. In the past we have supported a one-year statute of limitations on the basis that it would give industry a greater degree of stability in managing claims by improving our ability to predict losses and by reducing the unpredictability factors associated with extending the time for filing claims, particularly those in which the merits are questionable. We continue to support a one-year statute of limitations and recommend that S.849 be amended accordingly.

We also support an amendment of S.849 which would modify the formula for maintenance/compensation payments by changing the 80% wage factor to a ⅔ factor in sub-section 21.(b)(2)(A)(i). Since maintenance payments are tax-free awards, a payment of 80% of the wage or share the seaman would have received could be an amount equal to or greater than the seaman had received in past employment. Such payments could remove the incentive for a fisherman to return to work and become a burden on the industry in a system which otherwise would provide for reasonable and fair compensation.

We look forward to working with Commerce Committee members, your staff members, and other members of Congress toward our goal of having the Commercial Fishing Industry Vessel Safety and Compensation Act of 1987 as set forth in S.849, amended as we have recommended herein, enacted in this session of the Congress.

## Statement of Frank Drozak, President, Seafarers International Union of North America, AFL-CIO

On behalf of the fishermen engaged in the harvesting of various species of fish in both domestic and international waters, the Seafarers International Union of North America, AFL-CIO, wishes to express its support for the underlying effort of S. 849, legislation which seeks to establish guidelines for timely compensation for temporary injury incurred by workers on fishing vessels and to impose mandatory safety features on virtually all unregulated fishing vessels. We respectfully request that our comments be made a part of the official record of the joint hearing of the Senate Commerce, Science and Transportation Committee and National Ocean Policy Study being held this date.

S. 849 pursues a solution to a current crisis in the fishing industry, namely, escalating insurance premiums and the difficulties in obtaining adequate liabiliity coverage. If unresolved, the problem of unaffordability and unavailability of insurance will continue to threaten the very existence of the U.S. fishing industry and employment opportunities for fishermen and related industry workers. Equally important, S. 849 also addresses another serious problem: the absence of mandatory safety standards for commercial fishing vessels.

As noted, the SIU supports the intent of S. 849 which recognizes the natural interrelationship between the cost of Protection and Indemnity insurance and the risks and dangers inherent in commercial fishing. Since the risks of working in this unique environment are aggravated by the lack of mandatory safety standards, equipment and crew training requirements, the SIU concurs that neither safety nor insurance problems of the fishing fleet can be dealt with in isolation. In fact, we contend that inadequate safety conditions aboard many fishing vessels are largely to blame for rising insurance premiums. Because fishing vessels have traditionally been exempt from most statutes pertaining to marine safety, the result has been a high casualty record—84 lives and 250 vessels lost last year—with consequent placement in the high-risk insurance category. We, therefore, endorse the safety requirements found in S. 849 but urge adoption of even more comprehensive safety features, as recommended in H.R. 1836, legislation under consideration by the House Merchant Marine and Fisheries Committee. We believe that mandatory and preventive safety measures combined with inspection, training, licensing and certification procedures will reduce the number of accidents on fishing vessels, with the related benefit of lower premiums.

Without well-qualified and trained crews, no amount of safety equipment will protect the vessel and its mariners from an unstable marine environment which can overwhelm even the safest vessel. Mandatory safety standards are necessary for the commercial fishing industry because voluntary standards are effective only with responsible operators. While many operators already have demonstrated an increased commitment to and awareness of safer operations, it is unlikely that irresponsible and unsafe operators will pay much attention to such programs without legislative intervention.

The current crisis in the cost and availability of liability insurance is also attributed by underwriters and owner/operators to the uncertainties inherent in the current legal system used to compensate injured fishermen. What is seldom discussed is the role of the commercial insurance industry in the crisis precipitated by their investment decisions. Many of the insurance problems which face the fishing industry, and in fact, all American industries today, stem from ill-advised investments. Nevertheless, these companies tend to shift the fundamental cause of their financial problems away from their own method of operation to the tort-law system, attributing escalating claims settlements driven by sizeable jury awards in lawsuits for much of their profit erosion. In this context, the SIU notes with interest the provisions of S. 849 which recommend an alternative compensation regime to the traditional maintenance and cure system under federal admiralty law as one solution to the insurance crisis.

As the Members of the Committee know, fishermen have no other recourse than to seek protection under the umbrella of the Jones Act for death or personal injury claims. Therefore, careful consideration must be given to any proposal which would, even for a limited period of time, curtail or restrict a fisherman's right to judicial redress for non-permanent injuries. The SIU recognizes the importance of some form of workers' compensation system which would expeditiously address the financial needs of temporarily injured fishermen. However, we have certain reservations with respect to such a system as outlined in Title I of S. 849.

Notably, the SIU is concerned with the lack of defined terms for such important phraseology as "temporary illness, disability or injury." Questions as to what constitutes a temporary illness or injury or who evaluates a condition as temporary or permanent, or what is a "timely basis" for provision of compensation come to mind as being potential problems in implementing the mandates of the proposed legislation.

Although it is premised that a statute of limitations would decrease the uncertainty feared by fishing industry underwriters, the SIU does not believe that such provision would be in the best interest of the fisherman. For example, a fisherman would have little recourse if a temporary injury flared up in the future or turned into a permanent injury once the statue of limitations is operative. The SIU recommends that the Committee devise some sort of safety net so that a fisherman and his family are not penalized from enactment of a well-intentioned proposal.

As to the financial aspect of compensation in the proposed legislation, the SIU endorses the 80 percent of wage or share provision as one method for compensating injured fishermen. However, it has come to our attention that certain elements in the fishing industry have recommended that this share provision be deleted from the legislation. This would be unacceptable to the SIU, as it would be totally inequitable to the fisherman and his family. Further, the SIU does have reservations concerning the $30 per day minimum maintenance standard proposed in the bill. Upon review, it appears that this amount may be inadequate and may afford the fisherman only the barest essentials, if that. Therefore, the SIU recommends that the Members consider a more equitable financial compensation for temporarily injured or incapacitated fishermen.

As heretofore noted, the SIU does concur with the concept of a workmen's compensation system for fishing industry personnel. Unfortunately, Title I of S. 849 lacks explicit guidelines for the establishment of a compensation system for the fishing industry. It is our view that the Committee should consider and detail the type of system needed for this industry. Significantly, the system must take into consideration the uniqueness and operating chracteristics of the fishing industry as a floating workplace. Further, the mechanism under which disbursements pursuant to this fund may be made should be established, that is, a board to supervise the payments of compensation. This board should also be able to make preliminary findings that a fisherman is entitled to compensation after a finding of illness or injury. Additionally, assurances will be needed that companies operating fishing vessels have adequate assets to pay any claims that are made pursuant to this legislation. Such financial capability could take the form of an insurance system supervised by a federal agency or self-insurance. Because so much is at stake, the SIU urges the Committee to incorporate into the bill explicit congressional directives and guidelines concerning the above-mentioned concerns.

In order for the fishing industry to gain access to affordable and available coverage, fishermen are being asked to pay a high price through constraints placed on their existing legal rights. We trust that fishing vessel operators would embrace the minimal safety levels required by S. 849 and hope that they would in fact accede to the even higher levels of safety. However, since S. 849 is being launched in uncharted waters, it is very possible that the desired result will fail to materialize. Therefore, the SIU recommends that the Committee consider including a provision within S. 849 which would mandate congressional review of this issue within two years of enactment.

The SIU supports the establishment of a Commercial Fishing Industry Vessel Advisory Committee composed of industry, labor and government. As you know, the commercial fishing industry is fragmented and splintered on many issues with its members traditionally independent. Such a group, composed of individuals knowledgeable about the domestic fishing industry's problems, could provide guidance on fishing safety, insurance, maintenance and operation, and personal qualifications and training. It is hoped that membership on the advisory committee will include organizations that represent the ranks of fishermen in all areas falling the jurisdiction of this legislation.

The SIU commends the Committee for the initial and continued steps it has taken in response to the severe safety programs and insurance crisis facing the fishing industry. As in the past, we stand ready to continue to work with the members of the Committee to formulate and implement a comprehensive program which enhances safety in the fishing industry and brings the cost of insurance to affordable levels, while still providing fair compensation for ill or injured fishermen.

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## STATEMENT OF PACIFIC NORTHWEST COALITION FOR MARITIME LAW REFORM

### INTRODUCTION

This statement is being submitted by the Pacific Northwest Coalition for the Maritime Law Reform ("Coalition"), an ad hoc group of fishing and fish processing vessel owners based in Washington State and Alaska. Coalition member vessels are primarily engaged in the groundfish fisheries of the U.S 200-mile Exclusive Economic Zone in the North Pacific Ocean.

The commercial fishing fleet in the Pacific Northwest is currently experiencing an unprecedented expansion in both the number and size of fishing vessels operating in the North Pacific groundfisheries. Besides the 120 or so joint venture fishing trawlers currently working in these fisheries, as many as 35 new trawler/processor vessels (and possibly more), all exceeding 200 feet in length, will be operating off Alaska in 1988.

The Magnuson Fishery Conservation and Management Act has opened tremendous new opportunities for the American fishing industry in the Northwest. However, successful realization of these opportunities will require skillful and economically efficient operation of the U.S. fishing fleet. U.S. production of high volume/low value groundfish products, such as Alaska pollock, must be competitive in world markets. Failure to control any major cost variable—wages, fuel, insurance, etc.—will place U.S. vessels at a competitive disadvantage vis-a-vis other producers worldwide.

In recent years, one of the largest cost variables for fishing vessel owners has been insurance coverage for protection and indemnity insurance for seaman injuries. Not only have premiums skyrocketed but the number of companies offering coverage has declined dramatically. As one observer has put it: "P&I insurance could be the Achilles' heels of the Americanization process." Consequently, to remain competitive, the Pacific Northwest fishing fleet will have to have access to competitively priced marine insurance and maintain a strong safety program that reduces seaman injuries and associated economic losses. The Coalition is committed to these goals.

## S. 849: THE COMMERCIAL FISHING INDUSTRY VESSEL SAFETY AND COMPENSATION ACT OF 1987

The extensive hearings held by the House Merchant Marine and Fisheries Committee and this Committee have documented the special insurance problems in the fishing industry and possible balanced solutions to those problems. The testimony before the Committees—in particular the study submitted by Dennis Nixon—amply demonstrate the need for legislation addressing these special problems. Unlike other sectors of the maritime industry, fishing vessel organizations have expended a great deal of effort in developing marine insurance and safety legislation in light of the needs of the industry and the rights of injured seamen. The Coalition supports S. 849 and endorses the testimony of Mr. James Costakes, General Manager of the New Bedford's Seafoods Producers Association and Chairman of the Fisherman's Alliance for Insurance Reform (FAIR).

We recognize that laws regarding seaman compensation and marine insurance are quite complicated. Yet we believe that S.849, with some modification, offers the best chance of bringing needed reform to the system for compensating injured fishermen. The primary purposes of S. 849 are to insure that vessel owners act responsibly and on a timely basis and to assist seamen who have been temporarily injured by continuing to provide the traditional remedies of maintenance and cure. Dennis Nixon's study has established that unusually high compensation for temporary injuries is a particular problem in the fishing industry. Because of the litigation system, awards for temporary injuries frequently are out of line with the notion of fair compensation.

S.849 is based on the assumption that when a seaman is injured, he should be provided with adquate medical care and daily living expenses until such time as he can be returned to productive work. If so, he should not have to file a lawsuit and put both employer and employee through an expensive and uncertain process. Because permanent injuries present more difficult questions about liability and compensation, S.849 would make no major changes in existing law with regard to such injuries. Yet, the benefits we foresee from dealing with temporary injuries quickly and fairly would be positive to both boatowners and crewmen.

## FISHING VESSEL SAFETY

It is often said that the commercial fishing industry is the most dangerous occupation in America today. Given the often unpredictable environment under which fishermen must operate, it should be no shock to learn that accidents, even with the greatest precautions, do occur. However, we note that fishing vessel losses and deaths declined by almost 50% between 1985 and 1986, according to Coast Guard statistics. Members of our coalition are strongly committed to a voluntary safety program.

According to the information available, most accidents on U.S. vessels are the result of human error. The temptation to rush to an intensive, broad-scale government regulatory problem to eliminate the risks at sea with technical fixes and government inspections may be quite tempting to some. But we do not believe that the

Federal Government is either prepared for, or interested in, such a regulatory program. For one thing, such a program may or may not result in an increase in overall safety. As every fisherman knows, particularly those who operate their own vessels at sea, there is a strong incentive in protecting life and in avoiding the tremendous costs that come along with injuries at sea—not only to those injured, but also to the vessel owners. For these reasons, the Coalition strongly supports the voluntary efforts currently underway led by the Vessel Safety Program of the North Pacific Fishing Vessels Owners Association. In addition, the United States Coast Guard standards will surely make an impact on all those aspects of vessel construction and operation that are addressed by Navigation and Vessel Inspection Circular No. 5-86. Finally, S.849 contains various new mandatory safety measures to minimize risk of serious injury to crew.

We believe the combination of these efforts will improve the safety record of our fleet.

## SUGGESTED CHANGES TO S. 849

Under S.849, crewmen on fishing vessels will not be allowed to sue for temporary injuries, illnesses or disability only if the owners of those vessels provide timely and adquate maintenance and cure as specified in the legislation. Recent staff changes suggested to H.R. 1841 indicate that, in order to be timely, payment of a crewman's request for maintenance and cure must come within fourteen (14) days after notice from the crewman. The crewman must give his employer notice of his injury, illness or disability within thirty (30) days of its occurrence or of the date he learned of its relationship to his work. (We recommend that the Senate adopt this notice requirement.) His employer must then provide cure (medical expenses) and maintenance (now called compensation) of $30 a day or, if greater, 80% of the crewman's wage or share for the voyage during which he was injured.

The language dealing with these changes in existing law are critical to the success of those changes. Unfortunately, certain critical concepts are not as well explained as they could be—which will lead to considerable confusion if not remedied by drafting changes or explanations in the report on the bill. Below are explained the most important of these concepts, with recommendations for clarification.

1. *The Voyage.*—In most fisheries, the concept of the fishing voyage is well understood. The vessel is provisioned and crewed, goes to sea, and returns when the hold is full or the fuel tanks are empty. For such a voyage, a fisherman will get a wage or share of the profits (if any), depending on total catch, type of fish caught, and the then prevailing price for the fish.

However, in the Pacific Northwest particularly, the concept of the voyage may be changing. Larger factor trawlers may now stay at sea for long periods of time, rotating crews on a 30 or 60 day cycle. Provisions for the vessel and the vessel's catch are transported to and from the trawler by a tender or supply vessel and exchanged at sea. The vessel may enter port only for fuel or major repairs—perhaps once or twice a year. Under these circumstances, it is impossible to decide what constitutes a voyage from which is calculated the maintenance amount under S.849.

It is recommended that the language of the bill be changed to include the employment contract concept. It could be explained in the Committee Report that, at a minimum, the calculation must be based on a single voyage for those fisheries where a single voyage is common and can be readily identified in terms of duration. However, in those fisheries where crews are under contract to serve on a rotating basis on vessels at sea for long periods of time, the contract period of service on the vessel (e.g. 30 or 60 days or whatever) would be the basis of the calculation.

2. *Compensation Deadline.*—A fourteen day response period is onerous for most vessel owners, especially those with a large number of employees. A fairer period of time would be thirty days from the date the seaman gives notice of his injury, illness, or disability.

3. *Unearned Wages/Maintenance.*—Tied up in the term "maintenance" is the notion of payment for unearned wages to the end of the voyage. The Committee staff has recommended use of the term "compensation" to indicate that payment for lost wages is included. The present draft legislation needs to be clarified such that there is no uncertainty as to how to calculate what is owed the fishermen.

A suggested approach is the following:

A. The seaman should be paid 100% of the calculated daily wage or share (on a voyage or contract term basis) up to the date of injury, illness and disability.

B. For the unearned wage part of maintenance, the seaman should be paid 66⅔% of the calculated wage or share or $30 per day, whichever is greater, from the day after the date of injury, illness or injury until the end of the voyage or employment period.

C. The seaman should then be paid $30 per day from the date the voyage or the employment period ended until "cure" is obtained.

4. *Suggested Rewrite of S.849 (Sec. 21(b).*—". . . if the employer or vessel owner makes payment for, or otherwise provides for, within 30 days of notice under section 22 of this Act—

(1) cure for the ill, disabled or injured seaman; and

(2) compensation during the period of illness, disability or injury in an amount equal to—

(A) 100 percent of the wage or share the seamen earned for each day of a voyage or of a contract employment period up to the date of illness, disability or injury;

(B) the greater of—

(i) 66⅔ percent of the unearned wage or share the seaman would have received had the seamen been employed to the end of the voyage or contract employment period; or

(ii) $30 a day; and

(C) $30 per day for each day beginning after the end of the voyage or contract employment period.

The legislative history should indicate that payments end when the seaman has recovered or maximum cure has been achieved.

## SUMMARY

The Coalition supports S.849 and urges the Committee to report the bill as soon as possible with the changes suggested.

## STATEMENT OF THE AMERICAN TUNABOAT ASSOCIATION

Mr. Chairman and Members of the Subcommittee:

I am August Felando, President of the American Tunaboat Association (ATA). The ATA was organized in 1921, and is presently structured as a non-profit trade association formed and operating under the laws of the State of California. The membership of the ATA is comprised exclusively of persons who own and operate tuna purse seiners. Vessels of this type account for over 98 percent of those domestic tuna landings sold for processing into canned products by U.S. tuna canners.

Recommendations:

S. 849 recognizes that fishermen require a different maritime tort system than the other seamen engaged in the maritime trade. In this respect, we totally support the underlying effort of S. 849 as manifested by Title I of the bill. The question is whether the remedies offered by S. 849 are sufficiently equitable and realistic. Our objective is to change the existing legal system in a way that is not only fair to hurt fishermen but also fair to the fishermen who want jobs in fishing fleets that are economically viable. In the past few years, we have discovered that it is unrealistic to assume that fishing vessel owners will always be able to obtain and afford insurance coverage. We have also discovered that it is also unrealistic to assume that fishermen will not be tempted to abuse their freedom to file lawsuits against vessel owners.

Tuna Fleet Safety:

Since 1960, there have been only three sinkings involving the loss of lives of tuna fishermen aboard tuna purse seiners. The COMMANDER (built in 1946) sank on March 11, 1968 in the Gulf of California off Mexico with the loss of two crewmembers. On May 5, 1972, the SEAFARER (built in 1947) sank about 300 miles south of San Diego, homeward bound and fully loaded, with the loss of four lives. On June 19, 1978, the LIBERTY BELL (built in 1944) sank without apparent cause while on anchor with the loss of the Captain and a crewmember.

Since 1961, over 138 newly built tuna seiners have entered the U.S. Tuna Fleet. To date, no lives of fishermen have been lost in any of the 13 sinkings experienced by such group of vessels. (The sinkings involving the loss of life above related concerned seiners converted from baitboats that were built prior to 1950.)

The tuna fleet has averaged about 25,000 days at sea annually for the past 27 years or a total of about 675,000 days. Assuming a 16 man crew on an average seiner, this fleet has experienced about 10.8 million "working man days" at sea. The U.S. Tuna Fleet has operated off West Africa in the South Atlantic (1967-1974), in its traditional area of the eastern tropical Pacific Ocean, from California to Chile (1920-to date), and in waters of the central, western and south Pacific Ocean, from Palau to Indonesia, and from New Zealand to Hawaii, (1974 to date). Our traditional area, north of 10 degrees North Latitude in the eastern tropical Pacific, is frequented by many hurricanes. This is also true of many areas in the Western Pacific. We wish that we could report no loss of life associated with tuna vessel sinkings in the past 27 years. Nevertheless, we are proud of our record and believe it provides absolutely no cause for a burdensome and harsh safety regulatory system.

We suggest to this Subcommittee that other fishing fleets in the United States also have excellent safety records respecting loss of life associated with sinkings. Just as the tuna fleet, other fisheries have developed safety procedures in concert with marine insurers and surveyors. Should the Subcommittee desire, we would be pleased to provide documentation on how safety procedures and systems are implemented in the U.S. tuna fleet absent the pressure of federal inspection, regulation or training programs. Without an inventory of how this Nation's fishing fleets monitor their safety needs, we strongly urge that there exists no factual justification for the approach of a burdensome mandatory inspection system.

## Tuna Fleet Litigation; Need for Maritime Tort Reform

### a. Need for Tort Reform

In October 1986, the U.S. International Trade Commission published a report to the President on Investigation No. 332-224, under Section 332 of the Tariff Act of 1930, as amended. This report is entitled "Competitive Conditions in the U.S. Tuna Industry." On page 162, a table is printed providing the average tuna seiner's profit and loss data for the accounting years 1979-1985. This table was compiled from data submitted to questionnaires of the Trade Commission. In 1979, the average insurance cost was $85,367 and 5.7 percent of total expense; in 1985, the average insurance cost rose to $267,667 and 10.3 percent of total expenses. This represented a 214 percent increase in cost, and an 81 percent increase in share of total expenses.

We believe that the following facts illustrate the litigation problems of the Tuna Fleet during the period 1980-1985:

- In 1980, the fleet experienced an average of 4.33 claims per vessel; in 1985, the average increased to 6.57 claims per vessel. This represented a 50 percent increase in the frequency of claims per vessel. (This record of increase was experienced even though the number of vessels in the fleet was declining and while an increase was experienced in the number of inactive or idle vessels. See: USITC Report, supra, at page 158)

- In 1980, of the 517 claims recorded, only 99 resulted in lawsuits; in 1985, of the 506 claims filed, 152 resulted in lawsuits. This represents an increase of over 100 percent in the frequency of lawsuits per vessel.
- In 1980, the average claim cost was about $20,000; today, the average claim is about $60,000. This represents a 200 percent increase in costs.
- During the period December 1980 to 1981, the typical total premium for both Primary and Excess P & I insurance for a vessel with a crew of 18 and a $10 Million Limit of Liability was about $79,900. The deductible was $1,000 per incident. Today, the premium would come to $169,500, and the deductible has increased to an average of about $10,000 per claim. Therefore, in 5 years, the vessel owner has experienced over a 112 percent increase in premium and a 900 percent increase in the deductible.

Comments on Title I, S. 849: Proposed amendments to existing sections.

(a) Section 21(a)

We believe that the fishermen should be required to submit a Certificate under Penalty of Perjury as a condition precedent to the filing of a civil action brought under any law of the United States against the employer of such fisherman, a vessel owner, or a vessel for loss suffered as a result of an illness, disability, or injury suffered by such fisherman during the course of his employment to a fishing vessel, fish processing, or fish tender vessel. This Certificate shall contain the following statements:

(1) That the illness, disability, or injury was not "temporary" as defined in Section 21(a), because a medical panel composed of three doctors found that the illness, disability, or injury was a permanent illness, disability or injury, and

(2) That the medical panel was selected as follows: one doctor appointed by the fisherman; one doctor appointed by the employer or vessel owner, and one doctor selected by the two doctors previously designated by the fisherman and the employer or vessel owner.

(b) Section 21(b)(2)

The proposed payment described as "maintenance" is tied to earnings. If the maintenance payment is based upon "80 percent of the voyage or share the seaman would have received for each day that (the) vessel is on a voyage", then in the tuna fishery we believe there exists reasonable grounds to conclude that the injured fishermen has too much of a monetary incentive to stay home and avoid returning to work on the vessel.

First, the tuna fisherman is customarily hired for a fishing voyage only; there is no seasonal employment in the tuna purse seiner fishery. Thus, if the injured fishermen is required to abort the voyage, he has a right to be paid his share for the entire voyage. If at the time of injury, the vessel caught only 50 percent of its fish capacity, such share is known as "earned"; the remaining share as "unearned". Although S. 849 is silent on this point of the right of the injured fishermen to his unearned share of the voyage, we assume that the fisherman has a right to his share of the voyage regardless of whether it was earned or not.

Therefore, if a crewmember was earning $10 per ton on a 1,000 ton capacity tuna purse seiner, the injured crewmember would have the right to a $10,000 share for the voyage, less deductible trip expenses or advances. If the vessel made a 50 day voyage, the "maintenance" as required by Section 21(b)(2) would be $200 per day. In California, tuna fishermen aboard tuna purse seiners make State Disability Insurance payments; therefore, the fisherman has the prospect of collecting $224 per week or $32 per day in addition to the amount stated in the bill. We believe the proposal is much too costly and could be badly abused.

We recommend that "maintenance" be fixed at $30 per day, and that Section 21(b)(2) be amended as follows:

> "(2) maintenance during the period of illness, disability or injury in an amount equal to $30 a day."

Necessarily we also recommend that Section 21(c) be amended as follows:

> "(c) The Secretary of Transportation shall annually review the dollar figure in subsection (b)(2)."

## Comments on Title I, S. 849: Proposed New Sections

### (a) New Section: Collective Bargaining Agreements

1. The purpose of this Amendment is to reduce litigation between fishing vessel owners and fishermen. The lay or share system that prevails in U.S. fisheries promotes a close working relationship in the ship's company. The "team" approach on fishing vessels to catch a load of fish and then divide fish proceeds has been adversely impacted by tort litigation.

2. Tort litigation could be substantially reduced by allowing the interested parties to work out a collective bargaining agreement that would involve a suitable trade. This *quid pro quo* could be a substitute in the form of a statutory workmen's compensation system. The negotiated package could involve a mixture of life and disability insurance programs. In any case, the parties directly involved would be given the opportunity to work out their own arrangements.

3. We believe that the proposed bills before Congress, such as S. 849 and H.R. 1846 involve a system of modifying existing statutory and common-law remedies. Our proposed amendment would allow the collective bargaining process to also modify or waive the existing system, including that proposed by S. 849.

4. At present, the law is unclear on the extent to which statutory remedies can be contractually modified or waived through negotiations between the unions and vessel owners. In the 9th Circuit, the case of *Gardiner* v. *Sea-Land Service, Inc.*, 786 F.2d 943 (9th Cir.), *cert. denied, 107 S. Ct. 331 (1986)*, supports the contractual modification or waiver of the common-law remedy of maintenance and cure. In *Collins* v. *State of Alaska and Division of Marine Highway System*, decided on 28 July 1987, by the U.S. Court of Appeals, 9th Circuit Court, the Court noted in a footnote that a union may waive both common-law remedies of maintenance and cure and unseaworthiness and that a collective bargaining agreement containing such waiver provision would be a bar to a seaman's claim. Because the Court in the *Collins case* ruled that the Eleventh Amendment barred the seamen's claim against the State of Alaska, it did not directly answer the question of "whether a seaman's union can trade its member's traditional maritime remedies for remedies under a worker's compensation system."

5. The Circuit Court in its footnote comment also stated the following:

> "that a serious question remains whether the *Gardiner* analysis may be extended to the contractual waiver of Jones Act rights. See Section 5 of the FELA, 45 U.S.C. Sec. 55 (1982), ("any contract....the purpose or intent of which shall be to enable any common carrier

to except itself from any liability created by this chapter, shall to that extent be void") United States Bulk Carrier, Inc., v. Arquelles, 400 US 351,357 (1971). 'Since the history of (the labor laws) is silent on the abrogation of existing remedies of seamen in the maritime field, we construe it to provide only an optional remedy to them".

6. It is clear that fishing vessels are not common carriers. It is not clear whether the Courts would rule that a provision in a collective bargaining agreement waiving the Jones Act remedies and other seaman statutory remedies would be enforced.

The proposed amendment would have Congress "speak directly" on this narrow issue, and allow the U.S. fishing industry to work out its tort problems in a variety of negotiated systems as follows:

> "Sec. 103 COLLECTIVE BARGAINING
>
> To further the national policy of encouraging the use and reliability of collective bargaining agreements between fishing vessel owners and maritime unions, Congress declares that the provisions of such agreements that modify or waive fishermen's statutory remedies including the Jones Act, and fishermen's common-law remedies of unseaworthiness and maintenance and cure are enforceable."

(b) New Section: Definition of Proximate Cause

1. We believe that S. 849 could be further modified in a constructive manner. Our proposal would change the definition of "proximate cause" in Jones Act negligence actions. We are informed that the courts have established that the definition of "proximate cause" in an unseaworthiness civil action is different from the definition in a Jones Act civil action. The result of our proposal is to require that seaman aboard fishing vessels prove only what all other workers need prove to recover in personal injury lawsuits. A comparison of jury instructions best illustrates the difference between the standard of "proximate cause" in Jones Act cases and in unseaworthiness cases:

> "Proximate Cause" instruction in a Jones Act case:
>
> "Under the Jones Act claim, the negligence claim, an injury or damages considered proximately caused by an act or failure to act whenever it appears from a

preponderance of the evidence in the case that the act or omission played any part, no matter how small, in bringing about or actually causing the injury or damage. So if you find from the evidence in the case that any negligence of the defendant contributed in any way toward any injury or damages suffered by the plaintiff, you may find that such injury or damage was caused by the defendant's act or ommission." See Druit & Blackmar, Federal Jury Instructions, Section 94.13.

"Proximate Case" instruction in an unseaworthiness case:

"With respect to the unseaworthiness claim, it is necessary for the plaintiff to show that the condition of unseaworthiness played a substantial part in bringing about, or actually causing the injury to him, and also that the injury was a direct result or a reasonable probable consequence of the act or omission."

2. Our proposal is as follows:

Sec. 104. PROXIMATE CAUSE OF PERSONAL INJURY

In any civil action (including an action for contribution or idemnification) brought under any law of the United States or a State or political division thereof against the employer of a seaman, a vessel owner, or a vessel for loss suffered as a result of an illness, disability, or injury suffered by a seaman during the course of the seaman's employment to a fishing, fish processing, or fish tender vessel, the employer of a seaman, the vessel owner, or the vessel shall be liable only if a substantial factor in bringing about, or actually causing the injury is -

"(1) the unseaworthiness of the vessel, or

"(2) the negligence of such employer or owner"

## CONCLUSION

We appreciate the efforts of this Committee in recognizing the need to solve the "P & I" problem faced by the employers of fishermen and the owners of U.S. Flag Fishing Vessels.

Please accept our gratitude for holding this Hearing.

Thank you.

September 14, 1987

Honorable Ernest F. Hollings, Chairman
Senate Committee on Commerce,
Science and Transportation
508 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Hollings:

We are writing to express our concerns about a number of provisions in the "Commercial Fishing Industry Vessel Safety and Compensation Act of 1987," S.849. The need for improved safety and compensation in this area is acute, and we applaud your interest in addressing this problem. However, we hope you will agree that S.849 must be modified, as described below, so that we can work together to enhance safety, compensation and insurance protection for commercial fishermen.

To serve the public interest, we belive S.849 should be amended in the following manner:

1. The important safety standards included in the bill are of little value without an effective compliance-monitoring mechanism. The licensing, training and inspection provisions of Representative Lowry's bill, H.R. 1836, should thus be incorporated into S.849.

2. The legislation must ensure that maintenance and cure are provided in a timely fashion. The bill should therefore clarify that it does not restrict the availability of any cause of action or basis of recovery, including the right to maintenance and cure, attorney fees, punitive damages or the right to bring any civil action under the laws of the United States, except where cure and maintenance for temporary illness, disability or injury has been provided or paid on a timely basis (i.e., within 14 days of becoming legally due).

3. It should be clarified that a "temporary illness, disability, or injury" does not include loss of bodily or mental function. As the bill is currently drafted, non-temporary injuries may be limited merely to loss of "sight, voice or hearing," an "appendage," or "permanent disfigurement."

Also, it should be clarified that a "temporary illness, disability or injury" does not include total or partial permanent illness, disability or injury.

4. The statute of limitations should not be reduced from three to two years. No distinctions should be drawn between the statute of limitations for claims against fishing vessel owners and claims against the owners of other categories of commercial vessels.

5. Adjustments in the amount of payment for maintenance should be removed from the Secretary's discretion. Automatic adjustments, based on the consumer price index, should be made on an annual basis.

6. It should be clarified that the bar on filing a civil action fo the loss suffered as a result of temporary illness, disability or injuries does not apply when a vessel owner or employer negligently or recklessly violates vessel safety laws and regulations.

As you know, we share your concern for the personal health and safety of commercial fishermen, and for the financial well-being of their industry. We would be happy to work with your staff to resolve any differences we may have on S.849 so we can join forces to improve commercial fishing vessel safety and eliminate obstacles to compensation and insurance protection.

Thank you very much for consideration of our views.

Sincerely,

Gene Kimmelman

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